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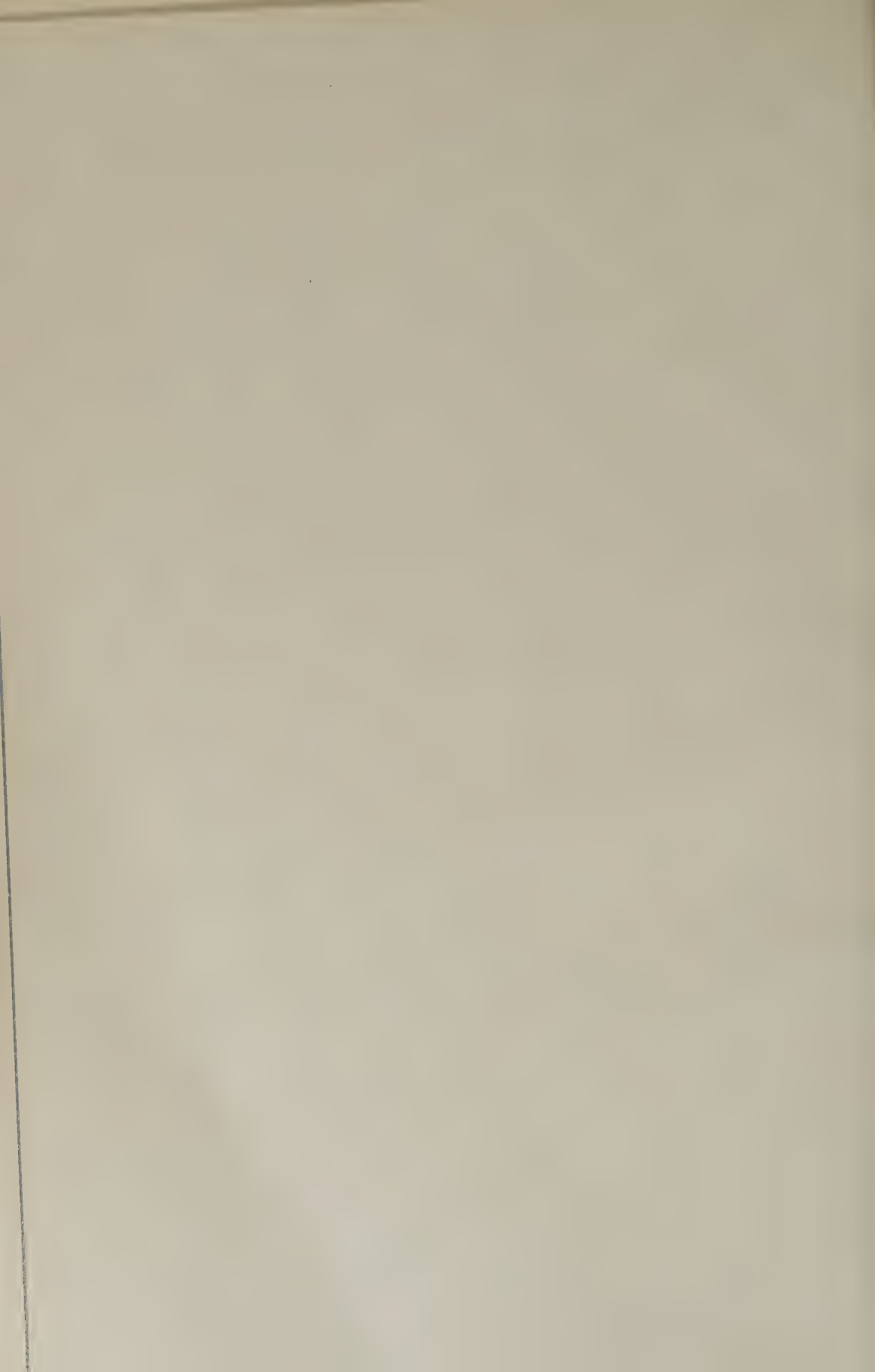


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SECOND SERIES



3 Cal.2d 463

GRIVI v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.

L. A. 15112.

Supreme Court of California.

April 30, 1935.

1. Judgment ☞518

Mandamus ☞4(1)

Writ of mandamus does not lie to correct errors of inferior tribunal and in so far as it seeks to avoid effect of judgment or order of court constitutes a collateral attack thereon.

2. Courts ☞112

Judge hearing divorce proceeding had no jurisdiction to file with records of case a report wherein judge reprimanded plaintiff's attorney for violation of court rule requiring that default divorce cases be set through calendar department where alleged violation had no effect on interlocutory decree entered (Rules of the Superior Court, rules 3, 7, 8, 16; Code Civ. Proc. § 129, as amended by St. 1933, p. 1823, § 32).

In Bank.

Original application by Henry Grivi for a writ of mandamus to be directed to Superior Court in and for Los Angeles County, Frank C. Collier, Judge Presiding, and others.

Writ granted.

Wm. H. Neblett, R. Dean Warner, and E. H. Mitchell, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

This is an application for writ of mandate by which it is sought to compel the respondent court to strike from its files—and in particular from the records of the case of McAdoo v. McAdoo, a document entitled "Report of Presiding Judge." It appears that on July 17, 1934, a divorce complaint was filed in the respondent court by Mrs. McAdoo against her husband. On the same day an answer was filed by the defendant admitting all of the allegations, except those relating to extreme cruelty. He denied that any conduct on his part had caused the plaintiff any grievous or mental suffering. On the same day, the papers in the case were taken before Judge Campbell, of Kern county, sitting at the time, by assignment of the chairman of the judicial council, in Los Angeles, and, upon stipulation waiving notice

of the time and place of trial, the case was tried by Judge Campbell, who granted Mrs. McAdoo an interlocutory decree.

Rule VIII of the Rules of the Superior Court, adopted by the judicial council, provides: "In all counties having a presiding judge, cases shall be set for trial under the supervision of the presiding judge." (213 Cal. pref. lxxxv.) Los Angeles is such a county. Rule XVI says: "In all counties having more than sixteen (16) judges, the presiding judge from time to time shall designate one or more departments as the department or departments in which a master calendar shall be set for the civil departments. Upon the calendar of such department or departments shall be set all civil cases to be tried during the period for which such calendar is set." Rule III also provides in effect that the presiding judge shall supervise the setting for trial of all civil causes and rule I says, among other things, that when a case is set for trial upon stipulation "the latter shall be accompanied by a corresponding memorandum"—i. e., a memorandum "which shall state that the cause is at issue, * * * the number and title of the cause, the nature of the cause, the time estimated for the trial thereof" and other pertinent information. Rule VII says: "Nothing in these rules shall prohibit setting for trial at any time, and in any department, any case which can be tried within a period of time not exceeding one hour."

Under section 129, Code of Civil Procedure (as amended by St. 1933, p. 1823, § 32), the court has authority to "make rules not inconsistent with the rules adopted and prescribed by the judicial council, or the laws of this State, for its own government and the government of its officers." We find in the rules of the superior court of Los Angeles, adopted pursuant to this section, certain provisions as follows: "The business of this court shall be supervised by one of the judges, to be known as the Presiding Judge. * * *" (Rule I, § 2.) "All civil actions and proceedings shall at the time of their filing be deemed assigned to the department of the Presiding Judge and shall be deemed pending in such department until assigned elsewhere. * * *" (Rule I, § 4.) "The Presiding Judge shall supervise the condition of the trial calendar of the court, including the master calendars, and shall readjust the assignment of causes at issue, at or before the time of trial thereof, in such manner as best to dispose of the business. * * *" (Rule I, § 4.)

Following the trial of the divorce case mentioned, the presiding judge made an investigation of the incidents leading up to the trial of the case on the same day the action was started and caused to be filed in the case the document mentioned which reads as follows:

Report of Presiding Judge:

"My investigation into the case of McAdoo v. McAdoo has resulted in the following findings:

"On the day the case was filed, some woman telephoned my secretary and asked if there were any 'out-of-county' judges sitting here. Upon receiving an affirmative reply, she then asked if there was a Judge Campbell and where he was sitting and the location of his court room. Upon receiving the information requested, the woman hung up the telephone.

"The same day and before the trial, some one telephoned Judge Allan B. Campbell asking him if he would try a divorce case. He said he would, as he was 'here to try cases' and told the inquirer to bring in the case at either one-thirty or four-thirty p. m. The name of the case was not disclosed.

"Judge Campbell was not familiar with the practice of this court, which requires that all default divorce cases be set through the calendar department, and he is therefore in no manner to blame for the irregular handling of this case. Judge Campbell comes from Bakersfield, where there are only three judges, and any one of them tries any default case as and when it is presented to him.

"In this court, however, the rule for handling default divorce cases is entirely different. They are, by the Calendar Department, sent in regular rotation to each of our judges except those in the criminal departments and those who have expressed a desire not to handle them. Only those attorneys who desire to 'slip something over' attempt to do otherwise.

"As presiding judge, I have on several occasions called back files from departments where the same irregularity was practiced or attempted to be practiced.

"That Mr. Grivi, Mrs. McAdoo's attorney was aware of our regular procedure is to me certain and beyond question. That his conduct in this case was irregular and subject to severe censure, is likewise beyond question.

"His actions in this case in violating the well-known method of procedure and in tak-

ing advantage of the lack of knowledge of a visiting judge, are contemptible, if not contumacious. He has the brazen effrontery to still assert that his conduct of the case has been regular in all respects.

"By his actions he has brought this court into disrepute; he has caused an innumerable group of people to believe that there is one procedure, slow and tedious, for the poor; and another, quick and active, for the rich or prominent; he has placed the ethical and conscientious members of the bar, who will not stoop to such practices and 'slip things over,' in a very embarrassing position with their clients.

"I am informed that the State Bar of California is investigating this matter and I shall lend to it all the assistance in my power.

"To prevent a repetition of such irregularities, I have today instructed Mr. L. E. Lampton, the county clerk, to allow no attorney or litigant to take any divorce file away from the counter. If they are needed in any department of the court, he is to send them to such department by one of his deputies or messengers. Much inconvenience may be thus caused to ethical practitioners at the bar. They can thank such men as Mr. Grivi for it.

"I have also ordered Mr. Lampton to instruct each of his court clerks to call the attention of their respective judges to each and every case wherein the regular setting procedure has not been followed.

"I shall do my utmost to see that a repetition of these irregularities does not occur again.

"As I have before stated, the irregularity in the McAdoo case is not such an one as has any effect on the decree rendered therein. It does, however, affect the standing before this court of the plaintiff's attorney, to his discredit."

Thereafter and on August 1, 1934, counsel for defendant therein made a motion to strike the document from the records on the ground that it was not connected with any issue in the case, and several other reasons, which it is not necessary to enumerate.

The parties through their counsel stipulated that the order sought might be made, but it was denied by the court on August 6, 1934. It appears from a transcript of the proceedings with respect to the document, which the parties hereto stipulated this court should examine for the purpose of determining the facts regarding the motion, that the respondent court strike the docu-

ment from the files, that the defendant has appealed from the order refusing to strike.

The respondents suggest two propositions as a reason why the writ should not issue. First, it is asserted that a proceeding in mandamus is a collateral attack upon the judicial action for which reason the truth or falsity of the order or record may not be assailed by evidence of facts not appearing therein. Second, assuming the correctness of the first, it is contended that the presiding judge had the jurisdiction to make and file the report.

[1, 2] It cannot be doubted that the writ of mandamus does not lie to correct errors of an inferior tribunal and in so far as it seeks to avoid the force or effect of a judgment or order of the court it constitutes a collateral attack thereon. *Gray v. Hall*, 203 Cal. 306, 265 P. 246; *Howe v. Southrey*, 144 Cal. 767, 78 P. 259. We are therefore to accept the facts appearing on the face of the record and limit our inquiry to the question of whether there was jurisdiction in the judge to file the report of which complaint is made. We cannot, however, agree with respondents that such jurisdiction existed. We may assume that under the rules of court heretofore mentioned the judge had the power to investigate a violation or an alleged infringement of the rules of the court by a practitioner at the bar (assuming the facts to be as stated in the report there can be no doubt that the attorney had violated those rules), but certainly, as he confesses in the written report, the irregularity had no effect upon the interlocutory decree. The report had nothing whatever to do with any issue in that case. There are three possible uses (perhaps more) which could have been made of the information secured by the presiding judge. He might have made it the basis of a report to his fellow judges for the purpose of devising a method to prevent a recurrence of the situation. Or, assuming the facts to be as stated, it might have become the foundation for a contempt proceeding, or possibly, as suggested, for a disciplinary action. All of these suggestions have to do with the conduct of the attorney, rather than with the rights of the litigants in the divorce action. It purports, however, to be none of these. Certainly as a contempt proceeding, the lack of the necessary steps to vest the court with jurisdiction is apparent. Assuming the power of the court to discipline its officers in proper cases, the record likewise discloses that no preliminary

proceedings to acquire jurisdiction over the attorney had been taken. Conceding the power of the court to institute one of the proceedings mentioned as a direct action against counsel, it lacked jurisdiction to make such proceeding ancillary to the divorce action. It was in fact an ex parte investigation made by the judge in the course of his administrative duties without notice to the attorney and he was without jurisdiction to cause it to be spread upon the records of the divorce action.

It being manifest, for the foregoing reasons, that the document has no place in the case, the peremptory writ ought to issue. It is so ordered.



3 Cal.2d 427

CRAWFORD v. SOUTHERN PAC. CO. et al.

S. F. 15280.

Supreme Court of California.

April 30, 1935.

1. Appeal and error ☞930(1)

Where defendant on appeal contends that evidence establishes plaintiff's contributory negligence as matter of law, all conflicts must be resolved in favor of plaintiff, and all legitimate and reasonable inferences indulged to uphold verdict if possible.

2. Appeal and error ☞989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

3. Appeal and error ☞996

Where two or more inferences can reasonably be deduced from the facts, appellate court is without power to substitute its deductions for those of trial court.

4. Appeal and error ☞996

To establish defense of contributory negligence as against verdict, evidence must be such that appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury.

5. Railroads ⇨350(32)

Whether driving slightly in excess of speed rate across railroad crossing by one injured in collision with switch engine proximately contributed to the collision *held* for jury (St. 1931, p. 2120, § 113).

6. Railroads ⇨350(28)

Whether truck driver struck by switch engine was contributorily negligent in driving upon customarily guarded crossing in absence of flagman when view was blocked by standing cars and in absence of warning by approaching switch engine *held* for jury.

7. Damages ⇨132(7)

\$15,000 *held* not excessive for compound comminuted fractures of both legs sustained by truck driver earning \$40 weekly at time of accident, where several operations were necessary, cost of hospitalization and medical care amounted to \$1,879, one or two more operations appeared to be necessary, some disability would be permanent, and burns, cuts, and bruises were also sustained in the accident.

In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Claude L. Crawford against the Southern Pacific Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 35 P.(2d) 577.

Harold D. Durst, of Redwood City, and Roy G. Hillebrand, of San Francisco, for appellants.

Fred A. Watkins and Edmund J. Holl, both of San Francisco, for respondent.

PER CURIAM.

Defendants appeal from a judgment in favor of plaintiff received in an action growing out of a collision between a locomotive operated by defendant company, and a truck operated by plaintiff. The major contention of defendants is that although the evidence clearly establishes their negligence, the evidence, as a matter of law, also establishes plaintiff's contributory negligence.

[1-4] In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, prin-

ciple of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Wing v. Kishi*, 92 Cal. App. 495, 268 P. 483. To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury. *Green v. Southern Pacific Co.*, 53 Cal. App. 194, 199 P. 1059; *Carey v. Pacific Gas & Electric Co.*, 75 Cal. App. 129, 242 P. 97; *Wing v. Western Pacific R. R. Co.*, 41 Cal. App. 251, 182 P. 969.

Keeping these well-settled rules in mind, we turn to a review of the evidence.

The accident occurred on November 14, 1931, at about 2:40 p. m., at a railroad crossing located on Third street just north of the intersection of that street with Sixteenth street in the city of San Francisco. On the day in question it had been raining intermittently, but it was not raining at the time of the accident. Plaintiff, at the time, was driving a White truck, heavily loaded with several hundred boxes of apples. Early in the morning of November 14, he had started from Watsonville, and at the time of the collision was proceeding north on Third street towards his employer's warehouse. The railroad crossing consists of two parallel sets of tracks which cross Third street on an angle. The locomotive involved was of a type known as a "switch engine," and it was proceeding in a westerly direction on the north set of tracks, that is, on the tracks farthest from respondent. The locomotive was drawing three loaded cars across Third street. Third street, at the crossing and for some distance on either side thereof, is nearly 70 feet wide, the westerly 33 feet being paved with asphalt, the balance being paved with cobblestones. Automobile traffic in

both directions customarily uses the asphalt portion of the street. Just beyond the cobblestone portion of Third street, and paralleling the street on the east side is an overpass used by street cars to cross the railroad tracks at this point. On the westerly side of Third street, north of the tracks is a flagman's shanty wherein the flagman whose duty it is to warn of approaching trains stays when his duties do not call him into the street.

According to the testimony of the respondent, and of two disinterested witnesses, on the day and at the time of the accident, there were two or three box cars of appellant railroad company spotted on the south track, that is on the track closest to respondent as he approached the crossing. One box car projected out into the cobblestone portion of Third street for a distance of about 18 feet. These box cars extended under the overpass. This fact, together with the fact that some lumber was piled along the railroad right of way on the east side of Third street, made it impossible for one approaching the crossing from the south to see around the end of the last box car. These box cars were stationary and not connected to a locomotive. They were so located that the view of one going north on Third street was so obstructed that it would be impossible to see a train approaching from the east until such person was within about 20 feet of the crossing.

Several of appellants' witnesses testified that no such box cars were on the south tracks, but it is significant that one of the appellants, the fireman on the locomotive, admitted such cars were there, but contended they were back under the overpass. The two disinterested witnesses produced by respondent not only testified the box cars were there as testified to by respondent, but also testified that within fifteen or twenty minutes of the accident such cars were moved back under the overpass.

The evidence is without conflict that a flagman is customarily present at the crossing in question. Respondent had traveled on Third street on many occasions prior to November 14, 1931, and was thoroughly familiar with the fact that a flagman was stationed there. Respondent testified that on every occasion he had passed the crossing prior to November 14, the flagman had been present to warn of the approach of trains. The testimony further shows that it was the habit of the flagman

to warn of the approach of trains by standing on the north side of the tracks in the middle of the asphalt portion of Third street and waving the usual hand signals.

Respondent testified, and we are bound by his testimony, that at the time of the accident there was no flagman at the crossing to warn of the approach of the train. It is true that several of appellants' witnesses testified that the flagman was in his customary place waving his signaling devices, but it is of some significance that one of the appellants, the engineer on the locomotive, who was sitting in the north side of the cab, and whose view of the crossing, and particularly the north side thereof, was unobstructed up until the moment of impact, and who testified that immediately prior to the accident he was looking ahead, stated he did not see any flagman at the crossing, although he had seen him there when he had passed over the crossing on a different trip some thirty minutes before the accident. For the purposes of this appeal, we must therefore, assume that although the flagman was customarily maintained at the crossing he was not there at the time of the accident.

Respondent, as already stated, was proceeding north on Third street. He testified that his truck was equipped with a governor so that he would not go faster than 25 miles per hour when the truck was loaded; that as he approached the crossing he noticed another truck in front of him about 150 feet distant traveling also in a northerly direction; that as the truck ahead came to the crossing it slowed down whereupon respondent also slowed down to about 15 miles per hour; that when he was about 150 feet from the crossing he put the car into "third," the truck having four speeds; that he looked to see if the flagman was there to signal the approach of a train; that the flagman was not there; that he looked for any signs of an approaching train; that there was nothing at all—no signs—to indicate the approach of any trains; that he heard no bell or whistle signalling the approach of a train; that his vision was good and he was looking ahead; that he observed the box cars on the south track protruding out into Third street; that the box cars obstructed his view of the north track to the east, but that directly ahead there were no obstructions to his view, that when he saw the box cars he looked toward the end of the string but he could not see the other end,

the cars going under the overpass and the lumber obstructing his view; that the box cars were stationary and he was watching them; that he observed the truck ahead of him slow down as it approached the crossing; that he slowed down and put the truck into "third"; that (from all the circumstances above mentioned) he "presumed the crossing was clear"; that he had his hand on the gear shift preparatory to shifting back into high gear when he observed the train approaching from in back of the box cars at an approximate speed of 15 miles per hour; that he slammed on the emergency brake and stood upon the foot brake; that the truck was equipped with air brakes; that he slowed down the truck until it was almost stopped at the time of the collision; that just before the collision he observed two men standing on the front of the locomotive; that he was afraid to swing to the left for fear of hitting the two men; that he observed the back of the head of the fireman in the cab; that the fireman was not looking in his direction.

Under such circumstances the truck and locomotive came into collision, the front corner of the truck coming into contact with the front corner and side of the locomotive. The truck was overturned and caught fire. As a result of the collision the respondent suffered the severe injuries hereafter referred to.

[5] The evidence as to respondent's speed just before the impact is not clear. The evidence is capable of the interpretation that when respondent was within 150 feet of the crossing he slowed down to 15 miles per hour and that he maintained that speed until he was within 50 feet of the crossing. He apparently then slightly increased his speed, preparatory to changing gears, to between 15 and 18 miles per hour. The Motor Vehicle Act, § 113 (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), provided for a 15-mile speed limit over railroad crossings where the view is obstructed. Assuming that respondent was slightly exceeding that rate and was therefore guilty of negligence per se, whether such negligence proximately contributed to the accident was of course a question of fact to be determined by the jury. *Baillargeon v. Myers*, 180 Cal. 504, 182 P. 37; *Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 164 P. 398; 19 Cal. Jur. 734, § 140.

The engineer of the locomotive testified that he was on the north side of the cab; that he was looking ahead and did not see

the flagman at his customary place; that there was nothing to obstruct his view of the intersection; that approaching the intersection the train was proceeding at between 6 to 8 miles per hour; that when the front of the locomotive was within 60 feet of the asphalt portion of Third street, the fireman yelled, "hold 'em," railroad parlance for putting on all brakes; that the train moved at least 60 feet before the collision and some few feet thereafter.

From the above résumé it is apparent that the negligence of the railroad company was clearly shown. The absence of the flagman from his place of duty, the obstructing the view and the failure to ring the bell all constitute negligence which the jury was justified in finding constituted the proximate cause of the injury. As we understand appellants' position, they do not question the sufficiency of the evidence to show their negligence, but contend that respondent failed to show that he took reasonable precautions in approaching the crossing and that his own evidence shows that he was guilty of contributory negligence as a matter of law. Appellants rely on the familiar rules emphasized in such cases as *Koster v. Southern Pac. Co.*, 207 Cal. 753, 279 P. 788, *Koch v. Southern California Ry. Co.*, 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, *Baltimore & Ohio Ry. Co. v. Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645, *Southern Pacific Co. v. Day* (C. C. A.) 38 F.(2d) 958; and many other cases, that a railroad crossing is of itself a place of danger and is a warning of danger and that even in the case of a guarded crossing, the traveler on the highway is not released from the duty of exercising due care for his own safety, and cannot, without regard for his own safety, blindly rely on the absence of the flagman, and treat such absence as a warranty that no train is approaching. Those cases and many others cited by appellants, undoubtedly hold that the absence of the flagman or other evidence of warning is not, of itself, sufficient to permit one injured in a collision at such a crossing to recover—he must show that he acted as a reasonably prudent man would act under all the circumstances and took reasonable precautions for his own safety. However, the cases recognize that the quantum of care required of one approaching a guarded crossing is much less than that required of a person approaching an unguarded crossing. The principles in-

volved in the present case were clearly stated by this court in *Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 221, 223 P. 553, 556. In that case, involving a guarded crossing, the trial court granted a nonsuit. As in the present case the flagman was absent from his place of duty and no bell or other signal was given by the approaching train. The plaintiff's view of the approaching train was obstructed. In reversing the decision of the trial court, Justice Seawell, speaking for the court, stated:

"Respondent places much reliance upon what is said in the case of *Jones v. Southern Pac. Co.*, 34 Cal. App. 629, 168 P. 586, to sustain the judgment of nonsuit. There the rule of *Chrissinger v. Southern Pac. Co.*, 169 Cal. 619, 149 P. 175, and *Griffin v. San Pedro, L. A. & S. L. R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842, to the effect that, 'Where the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard, under the circumstances shown, he is not entitled to have his case go to the jury,' is restated. It is true that that case involved as an element the question of an absent flagman. But the facts of that case are not the facts of this case. The elements which make up the case now before us and which have been stated were not present in *Jones v. Southern Pac. Co.*, supra. There the view of the plaintiff was unobstructed, and for a distance of 30 feet from the nearest rail of the track he had a plain view of defendant's train, and his conduct under the simple circumstances of the case was inexcusable. If he had looked at all, he would have seen the peril into which he was blindly driving. Other opportunities of protection were open to plaintiff in that case which are not shown in the present case. We do not here hold that one who blindly attempts to cross a steam railroad track, whether the crossing be guarded or unguarded, and by reason of such negligence is injured by being hit by a passing train, has a cause of action against the railroad company. The law casts upon every one the duty of exercising such care as is commensurate with the situation. The question is as to the quantum of care that was required to be exercised by appellant in the instant case.

"It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger which must always be heeded, and the ex-

ercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided. In *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 680, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, it is said that the adoption of safety gates or any other appliances by a railroad company for the protection of the public does not absolve the public from all duty of taking care of itself. 'A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance.' (Italics ours.) Continuing it quotes the following from *Ellis v. Boston, etc., R. R.*, 169 Mass. 600, 48 N. E. 839: 'The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that if any engine or train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But in attempting to cross the railroad he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. * * * While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more as to his own conduct than that he so relied.' * * *

"If a reasonably prudent person situated as appellant was situated, and seeing what he then saw and knew, would have been justified in acting upon appearances as appellant assumed to do, or, if reasonably prudent men would disagree as to whether appellant exercised ordinary care in the premises, then the case should have gone to the jury. The invitation to cross, the failure to ring the bell or sound the whistle, as required by the provisions of section 486, Civil Code, are elements which must be considered with all the other facts and circumstances of the entire case. The case of *Koch v. Southern Cal. Ry. Co.*, supra, is not inconsistent with anything said in *Wyseur v. Davis*, as Director-General of Railroads, 58 Cal. App. 598, 209 P. 213. The rule is there correctly stated to be: 'In discussing a similar question, the absence of a flagman from a crossing, in the case of *Elias v. Lehigh Valley R. Co.*, 226 N. Y. 154, 123 N. E. 73, it is said: "The danger is obvious. It is like in kind to that caused by raised and untended gates. To some extent it is an assurance that the way is safe. That the railroads recognize the danger is seen by the familiar sign at country crossings giving notice that the flagman is absent after 6 p. m." See, also, *Washington v. Birmingham Southern R. Co.*, 203 Ala. 295, 82 So. 545. Where operated during certain hours of the day only, open gates during the remainder of the day give the same assurance of safety to persons without knowledge of the limited operation thereof as if there were no such limitation, in the absence of reasonable notice by appropriate signs or otherwise. "Whether required by statute or not, the fact that the gate is open is held to be an invitation to cross and an assurance that the track can be crossed in safety." *Elliott on Railroads* (2d Ed.) § 1157; *State v. Boston*, etc., R. R. Co., 80 Me. 430, 15 A. 36; *Pittsburgh, C., C. & St. L. Ry. Co. v. Tatman*, 72 Ind. App. 519, 122 N. E. 357; *Washington v. Birmingham Southern R. Co.*, supra; *Montgomery v. Missouri Pac. Ry. Co.*, 181 Mo. 477, 79 S. W. 930; *Schwarz v. Delaware, L. & W. R. Co.*, 211 Pa. 625, 61 A. 255. "Open, they proclaim safety to the passing public; closed they proclaim danger." *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262; see, also, *Rose's U. S. Notes*. "By these signals thousands of travelers are governed every day." *Hooper v. Boston & M. R. Co.*, 81 Me. 260 17 A. 64. An open gate "is in the nature of an invitation to cross, and a declaration

that there are no approaching trains." *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136. See, also, *Delaware & H. Co. v. Larnard*, 161 F. 520, 88 C. C. A. 462; *Louisville & N. R. Co. v. Eckman*, 137 Ky. 331, 125 S. W. 729; *Carlin v. Michigan Cent. R. Co.*, 189 Ill. App. 23; *Lake Erie & W. R. Co. v. Howarth*, 73 Ind. App. 454, 124 N. E. 687, 127 N. E. 804.'

"The extent to which a traveler may rely upon the assurance of safety arising from the absence of a flagman from his post of duty on the presumption that it is safe for him to cross a railroad track which he is familiar with is generally held to be a question of fact for the jury. 33 Cyc. 1027; *Elliott on Railroads*, § 1651.

"It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury.' *Hoff v. Los Angeles Pacific Co.*, supra [158 Cal. 596, 112 P. 53], quoting from *Seller v. Market-Street Ry. Co.*, 139 Cal. 268, 72 P. 1006." See, also, *Ogburn v. Atchison*, etc., Ry. Co., 110 Cal. App. 587, 294 P. 491; *Cain v. Davis*, 55 Cal. App. 565, 203 P. 807; *Gregoriev v. Northwestern Pac. R. Co.*, 95 Cal. App. 428, 273 P. 76.

In *Robbins v. Southern Pac. Co.*, 102 Cal. App. 744, 750, 283 P. 850, 852, the trial court had also granted a nonsuit in a guarded crossing case. In the *Robbins Case* the view was, as in the instant case, obstructed by box cars. The flagman was actually in his customary place to give warning of the approaching train with two lighted lanterns, which however he held "back of his legs." In reversing the judgment of nonsuit the court stated:

"On the other hand, it is equally well settled that the duty to stop, look, and listen is not an absolute one, but rather one the exercise of which is dependent on the particular conditions obtaining at the time (*Hoffman v. Southern Pac. Co.* [Cal. App.] 279 P. 474; *Whitney v. Northwestern Pacific R. Co.*, 39 Cal. App. 139, 178 P. 326), and that 'if there is reasonable cause to believe there is no danger it is not negligence per se not to stop, look, or listen'

(*Wilkinson v. United Railroads*, 195 Cal. 185, 232 P. 131, 135). In the case just cited, it is also held that one of the circumstances which will excuse a failure to look and listen is 'where one has entered on the crossing under an express or implied invitation of the company's employees giving reasonable assurance of safety.' Such assurance of safety may consist of raised traffic bars, of open gates where such devices are maintained at crossings, or of the absence of a watchman or flagman at a crossing where one is usually stationed when trains are approaching. *Wyseur v. Davis*, 58 Cal. App. 598, 209 P. 213; *Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 223 P. 553, 554; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 845, 10 Am. St. Rep. 136; *Elias v. Lehigh Valley R. R. Co.*, 226 N. Y. 154, 123 N. E. 73, 74; *Hooper v. Boston & Maine Ry. Co.*, 81 Me. 260, 17 A. 64, 65.

"*Pennsylvania Co. v. Stegemeier*, supra, which is cited and relied on in *Wyseur v. Davis*, supra, was a case where a pedestrian attempted to cross a railroad track over a public street in the city of Fort Wayne. The gates were open at the time, and the flagman was in his shed, but he gave no warning. It was held that under the circumstances it could not be said, as a matter of law, that the pedestrian was guilty of contributory negligence in attempting to cross without taking the precautions usually required to discover approaching trains, and the court said: 'The case at bar is to be discriminated from those in which the injured person enters upon a track where there is no affirmative assurance of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross and of a declaration that there are no approaching trains.'

"In the final analysis, the test of negligence as applied to one about to cross a railroad track, the view of which is obstructed, should be: Would a reasonably prudent person, situated as the individual under consideration was situated, and see-

ing what he then saw, have been justified in acting upon appearances as it may be assumed he did? If reasonably prudent men might disagree as to whether ordinary care was exercised in the premises, the question should be left for the jury to determine. *Hoffman v. Southern Pac. Co.*, supra; *Gregg v. Western Pac. R. R. Co.*, supra."

[6] We think the reasoning of the two quoted cases and the cases cited therein is clearly applicable to the facts of the present case. The absence of the flagman from his customary position and the failure to sound a warning, under the circumstances here disclosed, constituted an implied invitation to cross and an assurance that no trains were approaching. We do not mean to hold that one approaching a crossing can blindly rely on the presence or absence of a flagman or failure to hear a bell or whistle without further regard to his own safety. Knowing he is approaching a point of possible danger he must exercise reasonable care. If the approaching train is visible, he must look for it, or if it sounds a proper warning, he must hear it, and failure so to do will constitute contributory negligence. But here the railroad company by spotting the box cars on the south track so that they completely obscured the view to the east and in failing to sound a warning and in failing to have the flagman present created what can aptly be referred to as a trap. By its actions the railroad company impliedly invited respondent to cross, assured him no train was approaching, parked its cars so he could not see, and now contends that by relying on the apparent appearance of safety created by it, he was guilty of contributory negligence as a matter of law. The respondent saw everything a reasonably prudent man would have seen. He kept a lookout ahead and he looked to the right towards the box cars. He looked for the flagman. He heard no whistle or bell. He did not and could not see the train until it was too close to avoid the collision. Under such circumstances we are of the opinion that the question as to whether respondent acted as a reasonably prudent man would have acted under the circumstances was one properly left to the jury.

[7] Appellants also urge that the damages awarded are excessive. The jury awarded respondent \$15,000. His special damages for hospitalization and medical care amounted to \$1,879. At the time of the trial, seventeen months after the in-

jury, he was still unable to work at his chosen business. At the time of the accident his weekly wage was \$40. Several doctors testified as to the serious nature of his injuries. He suffered compound comminuted fractures of both legs. The left tibia was broken into eight pieces and so crushed that the blood supply was partially cut off therefrom necessitating the tibia being wired together. His right tibia and fibula were also broken in several places. Several operations have already been performed on his legs, and one, and possibly two more operations will have to be performed. At the time of trial he was totally disabled from performing any work of the nature formerly performed. Some disability will be permanent. He suffered considerable pain and suffering. He was burned and suffered other cuts and bruises. In our opinion the damages are not excessive.

The judgment appealed from is affirmed.



3 Cal.2d 459

HENDRICKSEN et al. v. STATE SUBSIDIARY, LIMITED.

Sac. 4891.

Supreme Court of California.

April 30, 1935.

Rehearing Denied May 27, 1935.

1. Chattel mortgages ☞139

Grantee of ranch and live stock who permitted grantor to remain in possession without any evidence of change of title to or possession of chattels held estopped to claim ownership of stock as against third person to whom grantor executed chattel mortgage after conveyance to grantee, notwithstanding that consideration for chattel mortgage was forbearance to sue on pre-existing debt.

2. Chattel mortgages ☞229(1)

Mortgagees suing for possession only of mortgaged live stock could not recover value of the stock, which had been sold without realizing enough to reimburse mortgagee and defendant for feed advanced after suit was instituted, notwithstanding that mortgagees had superior claim, where mortgagees secured possession of stock at beginning of suit.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by W. A. Hendricksen and another against the State Subsidiary, Limited, to recover possession of certain hogs and sheep and the increase thereof or their value with damages for withholding same. From a judgment for the plaintiffs, the defendant appeals.

Reversed.

Prior opinion, 30 P.(2d) 453.

Barbour, Kellas & Backlund, of Fresno, for appellant.

J. K. Tuttle, Ben H. Johnson, and G. L. Aynesworth, all of Fresno, for respondent.

PRESTON, Justice.

Plaintiffs sued defendant for possession of a band of sheep and hogs. They took proper steps to claim an immediate delivery, which they secured within a few days after instituting suit. Both plaintiffs and defendant are acting in good faith in asserting the right to possession of the property. Plaintiffs claim under a chattel mortgage conferring the right of possession upon them. Defendant claims as purchaser from one Fred B. Fox. Little, however, can be said in favor of the good faith of Fox for, as the original owner of the "Fox" or "River" ranch in Madera county, he was also the owner of said herd and had it quartered thereon; likewise he was the agent of defendant and also of its affiliated corporation, California Mutual Building & Loan Association of San Jose; furthermore, he was in debt to both corporations. He conveyed the ranch and live stock to defendant in satisfaction of this indebtedness. At the same time he was also indebted to plaintiffs and soon after the conveyance to defendant, he calmly mortgaged the entire herd to plaintiffs. Hence this litigation.

[1] Defendant, however, must yield its claim to the superior claim of plaintiffs, because it was negligent in leaving Fox in charge of both the ranch and the said live stock without any evidence of change of title to or possession of the chattels. The court below properly held that under such circumstances defendant is estopped to assert its claim over that of plaintiffs. Washington, etc., Co. v. McGuire, 213 Cal. 13, 15, 1 P.(2d) 437. This is true notwithstanding the fact that the consideration for the

chattel mortgage was forbearance to sue upon a pre-existing debt. *Smitton v. McCullough*, 182 Cal. 530, 189 P. 686.

But by no means do these observations complete the story. The action was begun on November 19, 1931. Plaintiffs as noted above, secured possession of the property on or about December 10, 1931. Defendant answered claiming title and right of possession and asked that possession be restored to it, but took no steps to secure a redelivery of the property. At this point the sorrow of all the litigants began. The herd had to be pastured and fed and this required an outlay of money, to which both plaintiffs and defendant contributed unequal amounts. The case was put on trial February 11, 1932, but findings were not filed until December 13, 1932, and judgment for plaintiffs was not entered until January 3, 1933. However, on May 10, 1932, while awaiting the judge's decision, the parties stipulated to a sale of the herd. On this date plaintiffs had furnished feed to the value of \$755.50 and defendant had, at the special instance and request of plaintiffs, contributed therefor the sum of \$2,714.96. The parties did not seem to realize the fact, but nevertheless at this juncture the live stock were not worth the amount of the accumulated feed bills. In other words, in ranch parlance, they had "eaten their heads off." However, the sale was had and it netted only the sum of \$1,583.85. Pursuant to the stipulation, plaintiffs got from this fund their feed bill of \$755.50 and defendant got a pro tanto payment of \$828.35 on its feed claim.

The stipulation further provided that the balance of the fund, or proceeds, be deposited in a bank in the name of the superior court of Madera county, to be paid out only upon order of the court upon final determination of the litigation or further stipulation of the parties. The stipulation concluded with this language: "That the proceeds received from the sale of said hogs and sheep, less costs of sale, shall be substituted for and take the place of said hogs and sheep for all purposes of this action from and after the receipt thereof." But the coffers of the court still remain empty. No proceeds can ever be realized from the sale of said herd. However, undaunted by this untoward circumstance, plaintiffs insisted upon and secured, by the above-mentioned judgment, an award against defendant of \$3,221, representing

the full value of the herd on the day that they secured possession thereof. From such judgment, defendant has appealed.

[2] In other words, plaintiffs secured possession of the property, retained such possession until the expense of subsistence swallowed up the value thereof, and now, the defendant, they say, must pay them the value of the property at time of suit as a penalty for asserting an adverse interest in it. To be more specific, defendant surrendered possession of the property at the institution of the suit and contributed \$2,714.96 to its upkeep while the property was in the possession of its adversaries, and yet now it is asked to pay \$3,221 additional, besides interests and costs, as a penalty for claiming in good faith that the property really belonged to it.

It requires no particular strength of reasoning to see that there is something wrong somewhere. It still remains true that man may not eat his cake and keep it also. The fallacy in plaintiffs' reasoning is that they secured the property and kept it and there can be no judgment for the value thereof in lieu of such possession. The prayer of the complaint was for the value of the property in the event delivery thereof could not be had. But such delivery was immediately claimed, secured and retained. Suppose that on the day plaintiffs secured the property from defendant the whole herd had died. Would defendant be liable for the value of the herd because it asserted, in good faith, that it was entitled to possession thereof? The possession of the live stock was the full demand of the suit and this possession was immediately secured. To confirm this right, with costs and with special damages, if any, would be the sole relief that plaintiffs would have the right to enjoy. No such special damages were pleaded, nor can it be seen how such could arise. Likewise no damages for unlawful detention were pleaded or shown. It is true that at the beginning of the trial plaintiffs filed a supplemental complaint, alleging that the feed bill was accruing at the rate of \$13 a day and would eventually reach a total of \$1,500 before termination of the litigation and prayed for these sums as special damage. But the court gave no judgment on this issue and, moreover, it appears to have been thoroughly disposed of by the fact that defendant advanced for feed, above all offsets, more than the full value of the herd. No support can be found

in this record for a judgment in the sum of \$3,221 or in any other sum.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



3 Cal.2d 609

DOXSEE CO. v. ALL PERSONS CLAIMING ANY INTEREST IN, OR LIEN UPON REAL PROPERTY HEREIN DESCRIBED OR ANY PART THEREOF et al.

S. F. 15111.

Supreme Court of California.

May 6, 1935.

1. Quieting title ☞44(3)

In action to quiet title by grantee of realty from grantor whose final divorce decree had been set aside, evidence *held* to support finding that grantor and wife had permanently settled property rights prior to divorce proceeding.

2. Evidence ☞413

In action to quiet title by grantee from grantor whose final divorce decree had been set aside, testimony as to property settlement between grantor and wife before divorce *held* not inadmissible as attempt to change by parol evidence absolute deed into property settlement agreement, since deed was only incident of agreement.

3. Divorce ☞255

Final divorce decree *held* valid, notwithstanding order purporting to vacate it which was made on stipulation of counsel without clients' knowledge, since counsel and court, without clients' knowledge and consent, had no authority to set aside such decree.

4. Divorce ☞255

Final divorce decree entered in 1931 in conformity with terms of interlocutory decree, after entry of final decree in 1915 which erroneously purported to grant divorce to husband instead of to wife and invalid order purporting to vacate decree, was effective as nunc pro tunc correction of patent typographical error in prior decree.

5. Courts ☞116(1)

Courts have inherent power over their records, and may at any time correct mere clerical or typographical errors.

In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by the Doxsee Company against All Persons Claiming Any Interest in, or Lien Upon, the Real Property Herein Described, or Any Part Thereof, and Jennie Fagalde, wherein named defendant filed a cross-complaint. From a judgment for plaintiff, named defendant appeals.

Affirmed.

W. H. Hazell, of Lakeport, for appellant.

James T. O'Keefe, W. H. Morrissey, and Louis B. Dematteis, all of Redwood City, for respondent.

PRESTON, Justice.

Appeal by defendant Jennie Fagalde from judgment for plaintiff in an action to establish title to some 53 separate parcels of real property located in that portion of San Mateo county which was at one time a part of San Francisco county, of which area the land title records were destroyed by the fire of 1906. It was herein stipulated that plaintiff had taken all necessary proceedings under the McEnerney Act to give the court jurisdiction to hear and determine the cause. Only as to 4 of said 53 parcels of property is plaintiff's title here questioned. These four parcels were deeded to plaintiff on December 16, 1931, by Frederick A. Fagalde, as his separate property. By amended answer and amended cross-complaint appellant Jennie Fagalde asserted her ownership in fee of an undivided one-half interest therein.

To make understandable the claims of appellant, it is necessary to set forth a statement of her relations with plaintiff's said grantor, Frederick A. Fagalde, as found by the court and established by sufficient evidence.

Frederick A. Fagalde and appellant were married on June 25, 1904, and thereafter acquired, as community property, a 160-acre tract of land in Tehama county valued at \$7,000; also some hogs. In September, 1911, they performed a mutual agreement which the court here found was a settlement between them of their property rights, whereby the husband deeded to appellant's brother, for her, the said tract of land, and transferred the hogs to a groceryman, to whom they were indebted, in full payment of his claim; and they further agreed that any

property thereafter acquired by either of them would be that one's sole and separate property. At said time also they separated; the husband moved to San Francisco, and they have not since seen or spoken to each other.

In May, 1913, the husband filed an action for divorce against appellant in the San Francisco superior court alleging, among other things, that there was no community property. Appellant answered and cross-complained in said action, denying that there was no community property and affirmatively alleging that the husband was possessed of community property, but that she was unaware of the location thereof. By interlocutory decree, entered January 30, 1914, a divorce was granted to appellant, and it was further adjudged that the husband pay her \$50 counsel fees and \$11 costs "in addition to any settlement of property rights that may have been made between the parties hereto." On June 22, 1915, on motion of the husband, a final decree of divorce was entered. Unfortunately in said final decree the word "plaintiff" was erroneously inserted for the word "defendant" and thus the decree apparently failed to conform to the terms of the interlocutory decree and purported to grant the divorce to the husband instead of to appellant. About six months later, counsel for the husband and for appellant, without knowledge of or notice to either of them, stipulated to set aside said final decree, upon which stipulation the court, on December 20, 1915, made an order purporting to vacate it. Although said stipulation provided that the court might grant a final decree in accordance with the terms of the interlocutory decree, this was not done and no other or proper decree was entered at said time following said order to vacate.

The husband, believing that he was divorced, thereafter married, later was again divorced, and still later again married. On September 11, 1918, he acquired one of the four parcels of property here in dispute; on December 21, 1925, he acquired the second parcel; on February 14, 1923, the third parcel, and on December 14, 1908, the fourth parcel. At the time of the conveyance to plaintiff, December 16, 1931, a title search was made which revealed the flaw in the title chain caused by the purported setting aside of said final divorce decree of 1915. In an attempt to rectify the error, said husband, on December 24, 1931, made, and on December 31, 1931, filed in the superior

court, in said divorce action, an "affidavit for final judgment of divorce," pursuant to which the court, on the latter date, entered a final decree of divorce in conformity with the terms of the interlocutory decree.

In this connection, in the instant case, the court found that there was no legal or valid ground for setting aside the final divorce decree of 1915, and that it was not within the power of the attorneys in the divorce action to enter into said stipulation without this knowledge, notice to, or consent of their clients; "that in said final decree of divorce (1915 decree) the name of the plaintiff was through an error inserted where the name of the defendant should have been, this was a typographical error, a mistake which appeared upon inspection of the records, the final decree referred to said interlocutory decree and recorded in Judgment Book 70 at page 37 where said interlocutory decree was set out. That from these two decrees of divorce it shows that the interlocutory decree was duly made and entered and more than one year thereafter a final decree was properly granted and recorded in Judgment Book 85 at page 14, in the Official Records of the County Clerk of the City and County of San Francisco, June 22, 1915. That all questions as to the property rights of said Frederick A. Fagalde and Jennie Fagalde were by the pleadings before the court in that divorce action for consideration. The Court in the divorce proceedings had jurisdiction to inquire into and make disposition of their property rights."

From the evidence and the findings the court concluded that each of the parcels here involved was the sole and separate property of Frederick A. Fagalde at the time he transferred same to plaintiff and that plaintiff is now the owner in fee thereof. Judgment followed quieting title in plaintiff, and Jennie Fagalde promptly appealed, urging mainly specifications of insufficiency of the evidence to support the findings, particularly those relating to the property settlement and the setting aside of said divorce decree of 1915. With respect to the latter claim, appellant contends that as the husband on December 31, 1931, invoked the jurisdiction of the superior court in said divorce action to enter a proper final decree, he is therefore estopped to question the validity of the prior proceeding setting aside the earlier decree. Lastly, appellant contends that plaintiff is without legal right to make a collateral attack upon said divorce proceedings.

[1, 2] First, it may be said that there is abundant evidence to support the finding that the Fagaldes permanently settled their property rights prior to the divorce proceeding. The husband testified to this property settlement. Appellant did not appear to contradict him. The pleadings in the divorce action put in issue the existence of community property and the interlocutory decree indicated that a property settlement had theretofore been made by use of the phrase "in addition to any settlement of property rights that may have been made between the parties hereto." There is no merit in the contention that this testimony as to the property settlement was inadmissible, being an attempt to vary by parol evidence the plain and unambiguous terms of a written instrument, to wit, an attempt to transmute the deed of the Tehama ranch to appellant's brother, which was absolute in its terms, into a property settlement agreement. The deed was but an incident of the property settlement agreement; agreements between husband and wife respecting property rights may be made orally. *Estate of Patterson*, 46 Cal. App. 415, 189 P. 483; *Perkins v. Sunset, etc., Co.*, 155 Cal. 712, 103 P. 190.

[3] The action of the trial court in upholding the 1915 divorce decree was also clearly correct. After entry of a final judgment of divorce, respective counsel, without the knowledge and consent of their clients, upon stipulation, and the court, have no authority whatsoever to set it aside. *Knowlton v. Mackenzie*, 110 Cal. 183, 188, 42 P. 580; 6 Cor. Jur., p. 654, § 163; 2 R. C. L. § 85, p. 1006; *Suttman v. Superior Court*, 174 Cal. 243, 162 P. 1032; *Kellett v. Kellett*, 110 Cal. App. 691, 696, 294 P. 755; *De Haven v. Superior Court*, 114 Cal. App. 253, 300 P. 95. We hesitate to imagine what disastrous results might ensue were this not the law. Consider the position of this husband, who married, divorced, and married again firm in the belief of the validity of his first divorce. Other cases might present even more perplexing questions as to marital and property rights, legitimacy of children, etc. The authorities relied upon by appellant are not in point. None of them involves the authority of an attorney to set aside a final judgment of divorce without the knowledge or consent of his client.

[4, 5] The decree entered in 1931 can be effective only as a nunc pro tunc correction of the patent typographical error in the 1915

decree. Courts have inherent power over their records and may at any time correct mere clerical or typographical errors. *City and County of San Francisco v. Brown*, 153 Cal. 644, 651, 96 P. 281; *Halpern v. Superior Court*, 190 Cal. 384, 212 P. 916.

Lastly, we may dismiss appellant's contention that plaintiff was without legal right to make a collateral attack upon said divorce proceeding, with the remark that it was appellant herself who brought the divorce proceeding before the court in this cause. Plaintiff has not attacked said divorce proceeding, but has at all times contended for its validity, as established by the judgment herein.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



3 Cal.2d 420

MEEK v. FOWLER et al.

L. A. 15014.

Supreme Court of California.

April 30, 1935.

1. Automobiles ⇨181(1)

"Wilful misconduct" within automobile guest statute is the intentional doing of something in operation of motor vehicle which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that an injury to a guest will be a probable result (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Negligence ⇨11

Mere failure to perform a statutory duty is not alone "wilful misconduct," but amounts only to "simple negligence," since to constitute "wilful misconduct" there must be actual knowledge, or its equivalent, of peril to be apprehended from failure to act, coupled with conscious failure to act to end of averting injury.

[Ed. Note.—For other definitions of "Simple Negligence," see Words & Phrases.]

3. Negligence ⇨11, 13

"Gross negligence" is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while "wilful misconduct" involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.

[Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

4. Automobiles ⇨181(1)

Word "wilful" used in phrase "wilful misconduct" within automobile guest statute implies intent, but intention relates to misconduct, and not merely to fact that some act was intentionally done (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Wilful; Willfully," see Words & Phrases.]

5. Automobiles ⇨181(1)

"Wilful misconduct" within automobile guest statute does not mean sort of misconduct involved in any negligence, nor mere intent to do act which constitutes negligence (St. 1931, p. 1693, § 141¾).

6. Automobiles ⇨181(1)

"Wilful misconduct" within automobile guest statute implies at least intentional doing of something either with knowledge that serious injury is probable result, or with wanton and reckless disregard of possible results, but such intent and knowledge of probable injury may not be inferred from facts in every case showing an act or omission constituting negligence, since "wilful misconduct" means something more than gross negligence (St. 1931, p. 1693, § 141¾).

7. Automobiles ⇨244(20)

In action for death of automobile guest, evidence held insufficient to support a finding that driver was guilty of wilful misconduct based on attempt to cross intersection in advance of approaching automobile (St. 1931, p. 1693, § 141¾).

CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Anne Meek, an infant, by her guardian ad litem, Lillian L. Meek, and others against H. M. Fowler, Watha B. Fowler, Harold M. Fowler, and others. Judgment was rendered against plaintiffs and in favor of all the defendants, and, from an order granting a new trial to plaintiffs as against

named defendants, named defendants appeal.

Order reversed.

Prior opinion, 35 P.(2d) 410.

Francis J. Gabel, of Los Angeles, for appellants.

David E. Peckinpah and Conley, Conley & Conley, all of Fresno, for defendants Peckinpah.

Bronson, Bronson & Slaven and John H. Painter, all of San Francisco, Harry D. Parker, Raymond G. Stanbury, White McGee, Jr., and Vernon W. Hunt, all of Los Angeles, Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, and Frankley & Spray, L. W. Frankley, Joseph A. Spray, and W. H. Abrams, all of Los Angeles, amici curiæ.

Henry E. Barbour and Tarance S. Magee, both of Fresno, for respondents.

C. Douglas Smith, of Long Beach, amicus curiæ.

WASTE, Chief Justice.

This is an action for damages for personal injuries incurred by the plaintiff, Anne Meek, a guest in one of two automobiles involved in a collision at the intersection of Del Rey and Belmont avenues near the city of Fresno. Her parents are joined as parties plaintiff. Named as defendants are the driver of the guest car, Harold M. Fowler, a minor, and his parents, who owned the car and who had signed his application for an operator's license, and the driver and owner of the other car involved in the collision. Following a trial before the court, sitting without a jury, judgment went against the plaintiffs and in favor of all the defendants. Plaintiffs' motion for a new trial was granted as to the minor driver of the guest car and his parents, who have appealed from the order. They present two main contentions, the first of which involves the issue whether the evidence is such as to warrant a finding of wilful misconduct so as to make the driver of the guest car answerable in damages, under the 1931 amendment of section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, amended by St. 1931, p. 1693). Should the evidence warrant such a finding, it is then urged that it becomes essential to determine whether such wilful misconduct may be imputed to his parents as owners of the car or as sign-

ers of his application for an operator's license. Upon this latter proposition, the appellants urge, and they are supported by the briefs of several amici curiæ, that because section 62 of the California Vehicle Act (St. 1923, p. 532, as amended by St. 1929, p. 522) and section 1714¼ of the Civil Code, provide that the signer of a minor's application for an operator's license, in the one case, and the owner of an automobile used with his implied or express consent, in the other, is liable for the "negligence" of the minor, or the user, as the case may be, no recovery can be had against such signer or owner for any willful misconduct, as distinguished from negligence, of such minor or user, in the operation of such vehicle. The conclusion we have reached upon the first question above stated makes it unnecessary for us to pass upon the latter one. In our opinion, the evidence will not warrant a finding of willful misconduct on the part of the minor operator, and we therefore refrain from expressing any opinion upon the question whether his willful misconduct, if shown to exist, may be imputed to the owner of the car or the signers of his application for an operator's license.

The accident occurred about 7 o'clock on the evening of August 14, 1932. Just prior thereto the car in which the injured plaintiff was riding was proceeding in a southerly direction along the right side of Del Rey avenue. The minor operator thereof testified that when he was approximately 100 feet from the intersection of Belmont avenue he was traveling at a speed of about 28 miles an hour; that he then looked to his right and saw, over or through some vines or trees that line the thoroughfare, the lights of an approaching car on Belmont avenue; that said car, operated by the defendant Peckinpah, was at that time approximately 200 feet from the intersection; that after looking to observe the lights and position of the approaching vehicle, he accelerated the speed of his car to approximately 30 miles an hour and continued on and into the intersection, believing that he had ample time to negotiate the crossing ahead of the Peckinpah car; that as his car entered the intersection he observed the other car near the west line of the intersection; that he immediately applied his brakes and turned his car to the left in the hope of avoiding a collision. This latter effort proved futile, the impact occurring near the center of Del Rey avenue and on the south side of Belmont avenue.

The testimony of the injured plaintiff, and that of another guest in the car, was, as to certain matters, antecedent to the accident, substantially the same. Their versions as to the rate of speed at which the guest car was traveling just prior to and at the time of the accident vary from that of the operator of said car. The plaintiff testified that when they were about a quarter of a mile from the intersection they were traveling about 35 miles an hour; that the defendant Fowler did not slow down as his car entered the intersection, even though he had been requested earlier in the evening by the plaintiff to go "at a slower speed at intersections"; that she saw the other car involved in the accident just before entering the intersection and when both cars were about an equal distance therefrom and traveling at about the same rate of speed; that on prior occasions the operator of the guest car "always drove all right"; that she did not remember telling an adjuster three days after the accident that the defendant Fowler reduced the rate of speed of his car to fifteen or twenty miles an hour, but that she did remember telling him, "our car was in the intersection first," and that the other car was going at a high rate of speed. A written statement, bearing plaintiff's signature, was introduced in evidence, wherein appears the following: "We traveled south on Del Rey avenue about 25-30 miles per hour. Harold [operator of the guest car] slacked his car down to 15-20 miles per hour before entering the intersection. * * * [when] within the intersection a very short distance I saw the lights of a car approaching the intersection * * * about 200 feet west of the intersection; it was traveling at a high rate of speed, I would estimate about 45-50 miles per hour. It was right on us in less than a moment * * * Harold did his best in attempting to avoid an accident by swerving to the left and trying to get across before the other car reached us. Our car was in the intersection first. * * *" Plaintiff attempted to explain those portions of the written statement that vary from her testimony by stating that they were untrue and were prompted by a desire to protect the defendant Fowler from a manslaughter charge in the event she died from the injuries incurred.

The other guest in the Fowler car testified that though earlier he had told the operator thereof to "take it easy," he nevertheless entered the intersection between 40

and 45 miles an hour. This witness likewise testified that he did not remember telling an adjuster that the guest car was traveling about 20 miles an hour at the time of the impact. A written statement, signed by this witness, was received in evidence and contains the following: "As we approached the intersection Harold traveled about 25-30 miles per hour. Before entering the intersection Harold slowed down to about 15-20 miles per hour."

The mother of the driver of the guest car, also named as a defendant, testified that she talked with the plaintiff on the day following the accident, and that the latter said that the occupants of said car thought they could get across the intersection before the other car, which was approximately 200 feet away; and that the plaintiff did not at that time blame the operator of the guest car for the happening of the accident, nor did she say he had been speeding.

The person who had procured the written statements above referred to testified that he heard the conversation between the plaintiff and the mother of the operator of the guest car, and that he returned two days later and procured the written statements. He stated that he wrote the details of the accident as narrated to him by the plaintiff, and that the latter read and signed the same when completed.

[1] We have examined the entire record and, in our opinion, those portions thereof most favorable to the plaintiffs will not support a finding of willful misconduct. The phrase "willful misconduct," as employed in our so-called guest statute, has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 626, 25 P.(2d) 988, 990, wherein it is declared that "'willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

[2-6] The case of *Howard v. Howard*, 132 Cal. App. 124, 128, 22 P.(2d) 279, 281, after defining gross negligence as set forth in *Krause v. Rarity*, 210 Cal. 644, 293 P.

62, 77 A. L. R. 1327, and what is meant by willful misconduct as set forth in *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 P. 510, declares that:

"The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

"While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence, for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of willful misconduct. As has been repeatedly declared, "'willful misconduct' means something

more than negligence—more, even, than gross negligence.” North Pac. S. S. Co. v. Industrial Accident Commission, 174 Cal. 500, 502, 163 P. 910, 911; Kastel v. Stieber, 215 Cal. 37, 47, 8 P.(2d) 474.

[7] The evidence in the present case is capable of but one construction, viz., that the attempt of the driver of the guest car to cross the intersection in advance of the Peckinpah car, whether he was driving at a normal or an excessive rate of speed, was the result of his conclusion, mistaken though his judgment may have been, that he could safely negotiate said crossing before the arrival of the other car. His conduct under the circumstances constituted, at most, gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of, or that he was utterly indifferent to, the rights of his guests. While his judgment, under the circumstances confronting him, may have been poor, it does not appear that he was wantonly reckless in exposing his guests to danger, nor did his conduct partake of the nature of a willful, intentional wrong.

The order appealed from is reversed.

We concur: SHENK, J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.

CURTIS, Justice.

I dissent. If willful misconduct is correctly defined in the opinion as implying “at least the intentional doing of something either with knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result,” then I think the minor was guilty of willful misconduct when he drove his car at a speed of 40 to 45 miles per hour onto and across an obstructed or blind intersection knowing that another car was approaching the intersection on the cross street at a rapid rate of speed. In doing so, he was surely driving his car with a wanton and reckless disregard of the possible if not a probable result of a collision with the car which he knew was on the cross street, or with some other car which might be on said cross street and which was approaching said crossing. I, therefore, submit that the opinion is erroneous in concluding that the minor was not guilty of willful misconduct.

3 Cal.2d 469

NOTTEN et al. v. MENSING et al.
L. A. 14911.

Supreme Court of California.
April 30, 1935.

Rehearing Denied May 29, 1935.

1. Frauds, statute of Ⓒ75

Oral agreement to make mutual wills is within statute of frauds (Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6).

2. Wills Ⓒ78, 79

A will, even a mutual one, is ambulatory until death and may be revoked, notwithstanding an agreement not to revoke (Probate Code, § 23).

3. Specific performance Ⓒ86

Where there is a valid agreement not to revoke mutual wills, which agreement is fair and reasonable and adequately supported by consideration, equity will grant a “quasi-specific performance” by making parties who receive the estate constructive trustees for the intended beneficiaries under the revoked mutual will in accordance with the contract.

4. Frauds, statute of Ⓒ119(2)

Where two parties execute reciprocal wills pursuant to oral agreement and one party dies before either will is revoked and other party accepts benefits of decedent's will and then revokes, a constructive fraud sufficient to raise estoppel to plead statute of frauds has been practiced on first decedent and on beneficiaries of oral agreement (Civ. Code § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6).

5. Estoppel Ⓒ53

It is not necessary to existence of an equitable estoppel that there should exist a design to deceive or defraud, but it is sufficient if person against whom estoppel is asserted by his silence or his representation has created a belief of existence of a state of facts which it would be unconscionable to deny.

6. Frauds, statute of Ⓒ155

Complaint alleging oral agreement of husband and wife to leave property to their respective collateral kindred, making of reciprocal wills pursuant to agreement, husband's death before either will was revoked, wife's acceptance of benefits under husband's will, wife's revocation of old will and execution of new one in violation of oral agreement, held sufficient to raise estoppel to plead statute of frauds (Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6).

7. Wills §58(2)

To establish irrevocability of mutual will executed pursuant to oral agreement, burden rests on plaintiff to prove such agreement by full, clear, and convincing evidence.

8. Wills §58(2)

That wills are reciprocal or contain similar or identical provisions, or that they were executed at same time, is insufficient to establish oral agreement for execution of wills.

9. Specific performance §28(1)

Oral agreement for mutual wills held sufficiently certain to warrant specific performance.

10. Specific performance §114(2)

Complaint for specific performance need not state verbatim that there was adequate consideration for contract, or that contract was just and reasonable; it being sufficient to allege facts from which such conclusion may be drawn.

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Henry Notten and others against Marques B. Mensing and others. From judgment for defendants entered upon sustaining demurrer to complaint without leave to amend, plaintiffs appeal.

Reversed.

E. W. Howell, Sheridan, Orr, Drapeau & Gardner, and Stacy C. Bates, all of Ventura, for appellants.

Don G. Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for respondents.

PER CURIAM.

Plaintiffs appeal from a judgment entered upon the sustaining of a demurrer without leave to amend to their complaint. The action is one to enforce a constructive trust on certain property devised to defendants by the will of Carrie M. Notten, deceased; the plaintiffs being certain of the relatives of the husband of the deceased.

The general theory of the complaint is that plaintiffs were beneficiaries under mutual, reciprocal wills executed by John W. Notten and Carrie M. Notten, husband and wife, pursuant to an oral agreement to the effect that upon the death of either all of their property should go to the survivor and, upon the death of the survivor, to certain designated relatives of the parties, in-

cluding plaintiffs; that after the execution of the wills and before they were revoked, the husband died; that the wife accepted in full the benefits of the husband's will; that after the death of her husband she revoked her will and executed a new will, leaving all of the property to defendants. The main question presented is whether, under the circumstances set forth in the complaint, the oral agreement therein alleged is enforceable, or whether such agreement is unenforceable because of the provisions of section 1624, subdivision 6, of the Civil Code, and section 1973, subdivision 6, of the Code of Civil Procedure, which sections provide that "an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will" must be in writing.

Before disposing of this question, it is necessary briefly to review the allegations of the complaint. So far as pertinent here, it alleges that for many years prior to 1921 John W. Notten and Carrie M. Notten were husband and wife, and childless; that John W. Notten was then about 78 years of age and Carrie was about the same age; that they had acquired a small orchard in Ventura county upon which they lived; that they had executed an oil and gas lease on said premises; that oil and gas were discovered on their land and oil and gas were produced in paying quantities and gave promise of future revenue to the spouses; that in September, 1921, the spouses "being aged and without heirs of their bodies * * * and foreseeing a potential increase of their moderate means, commenced to consider the matter of making testamentary disposition of the same to their collateral heirs"; that John W. Notten had four brothers and sisters, living and dead, the deceased ones leaving numerous children; that Carrie M. Notten had five brothers and sisters, one being deceased, leaving three children; that it was the desire of both husband and wife that, upon the death of either, the whole of their estate should go to the surviving one for life and then to the two lines of collateral heirs equally; that accordingly the "spouses entered into a mutual and oral agreement to execute mutual or reciprocal wills devising said estate, first, to the surviving spouse, then in a particular way, to be set forth identically in each will. That in pur-

suance of said mutual agreement and in performance thereof the said spouses on the 30th day of September, 1921, each duly made and published in the presence of the other with his or her knowledge, consent and acquiescence, such a will," copies of which are attached to the complaint as exhibits; that before either of the wills had been revoked, John W. Notten died on January 8, 1923; that Carrie M. Notten presented his will for probate and, pursuant to the terms thereof, his total estate was distributed to her; that she accepted the same "and thereafter possessed, controlled and enjoyed it until her death"; that the approximate present value of the estate is \$1,000,000; that Carrie M. Notten died on the 16th of October, 1933; that there was then presented a will executed by her February 3, 1929 (a copy of which is attached to the complaint as an exhibit), which will specifically revokes all former wills; that the 1929 will has been admitted to probate; that by the 1929 will Carrie Notten bequeathed to her blood relatives the sum of \$540,000 in specific bequests and to certain of her blood relatives the residuum of her estate of equal value; that by the 1929 will she left to her husband's relatives specific bequests totaling \$5,100; that plaintiffs are some of the lawful heirs of John W. Notten; that defendants are the legatees under the will of Carrie M. Notten.

The reciprocal wills are practically identical in terminology; John W. Notten naming his wife as sole legatee, and she naming him as sole legatee. The provisions for the collateral kindred of the two spouses in the two wills upon the death of the survivors are identical. The two wills were executed on the same day, and the same two persons witnessed both.

[1-3] We are presented with the question as to whether such a complaint states a cause of action. It is obvious that the oral agreement set forth in the complaint, i. e., to make reciprocal wills in a particular way, comes directly within the provisions of the statute of frauds above referred to. However, the present action is not one to have the mutual will of Carrie M. Notten probated, but to have a constructive trust declared on the property held by the legatees of Carrie M. Notten, in accordance with the provisions of the 1921 will. It is clear that a will, even a mutual will, is ambulatory until death, and hence may be revoked, notwithstanding an agreement not to revoke. Section 23, Probate Code;

In re Rolls' Estate, 193 Cal. 594, 226 P. 608. However, even though such a mutual will may be revoked, where there is a valid agreement not to revoke, which agreement is fair and reasonable and adequately supported by consideration, equity will grant a sort of "quasi-specific performance" by making the parties who receive the estate constructive trustees for the intended beneficiaries under the revoked mutual will, in accordance with the terms of the contract. *Wolf v. Donahue*, 206 Cal. 213, 273 P. 547; see notes 13 Cal. L. Rev. 179; 28 Harvard L. Rev. 237, 241. This principle is recognized as the general rule in most jurisdictions. It is stated as follows in 69 Corpus Juris, page 1302, § 2725: "The rule is well settled that, on the death of one of the parties to an agreement for mutual wills, leaving a will in accordance with the agreement, the survivor becomes estopped from making any other or different disposition of his property than that contemplated in such agreement, and his obligations under the agreement become absolutely irrevocable, and enforceable against him, at least where he avails himself of provisions of decedent's will in his favor, or accepts any benefits thereunder, even though, it has been held, his will is revoked by operation of law, as by his subsequent marriage; and his heirs, after his death, have no rights better than, or superior to, his own."

In this state, however, since 1905, such agreements, under the provisions of the statute of frauds above quoted, must be in writing. Generally speaking, since 1905, oral agreements to leave property by will, or not to revoke a will already made, are unenforceable. *Luders v. Security T. & S. Bank*, 121 Cal. App. 408, 9 P.(2d) 271; *Cazaurang v. Carrey*, 117 Cal. App. 511, 4 P.(2d) 259. The same two cases, and others referred to therein, hold that the execution of a will in accordance with the oral agreement, which will does not expressly refer to the contract, does not constitute a note or memorandum sufficient to satisfy the statute of frauds. See, also, note, 20 Cal. Law Rev. 654. The same cases also indicate that the execution of mutual wills, the death of one of the makers, and the acceptance of the benefits under such a will by the other, does not constitute a sufficient part performance to take the case out of the statute of frauds. See, also, *Baker v. Bouchard*, 122 Cal. App. 708, 10 P.(2d) 468; *Trout v. Ogilvie*, 41 Cal. App. 167, 182 P. 333; *Forbes v. Los Ange-*

ies, 101 Cal. App. 781, 282 P. 528. This is contrary to the rule in some states. See cases collected in 69 Cor. Jur., p. 1303, § 2728.

[4] However, the fact that the instant case does not come within the above two exceptions to the operation of the statute of frauds is not sufficient to dispose of the issues raised. There is a long line of authorities in this state to the effect that under the proper circumstances a party may be estopped to plead the statute of frauds. We are of the opinion that the facts pleaded in the complaint present a proper case for the application of that rule. It is our opinion that when two parties execute reciprocal wills pursuant to an oral agreement, and one of the parties dies before either will is revoked, and the other party accepts the benefit of the decedent's will, and then revokes, a constructive fraud sufficient to raise the estoppel has been practiced on the first decedent and on the beneficiaries of the oral agreement.

The leading case in this state holding that, under the proper circumstances, one may be estopped to plead the statute and that such doctrine applies to all of the provisions of the statute of frauds, is *Seymour v. Oelrichs*, 156 Cal. 782, 794, 106 P. 88, 94, 134 Am. St. Rep. 154. It is there stated:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pom. Eq. Jur. § 921. It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am. Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a

denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See *Browne on Statute of Frauds*, § 457a. In the section last cited, Mr. Browne says: 'A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.'

"We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove*, 100 U. S. 578, 580, 25 L. Ed. 618, and quoted therefrom in *Carpy v. Dowdell*, 115 Cal. 677, 687, 47 P. 695, 697 as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'"

Many other cases could be referred to where the facts have been held sufficient to raise the estoppel. See *Fleming v. Dolfin*,

214 Cal. 269, 4 P.(2d) 776, 78 A. L. R. 585; *Peek v. Peek*, 77 Cal. 106, 19 P. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; see also, cases collected in 20 Cal. L. Rev. 663; *Vogel v. Shaw*, 42 Wyo. 333, 294 P. 687, 75 A. L. R. 639, 650.

[5] In order to raise the estoppel, fraud in some form is essential, but it is not required that an actual intent to defraud or mislead exist; all that is required is that there exist "a fraud inhering in the consequence of thus setting up the statute." *Seymour v. Oelrichs*, supra, 156 Cal. 782, page 796, 106 P. 88, 94, 134 Am. St. Rep. 154. In *Anderson v. Hubble*, 93 Ind. 570, 576, 47 Am. Rep. 394 (which case is quoted with approval in the *Seymour Case*, supra), the rule is stated as follows: "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. * * * All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design."

[6] Although in the present case fraud is not alleged as a conclusion, the facts from which that conclusion necessarily follows are alleged. The complaint, although not a model of pleading, sufficiently alleges the facts necessary to raise the estoppel. The complaint alleges the making of the oral agreement to leave the property to their respective collateral kindred upon the death of the survivor; the making of the reciprocal wills pursuant to such agreement; the death of the husband before either will was revoked; the acceptance by the wife of the benefits under her husband's will; the wife's revocation of the old will and the execution of the new will in violation of the oral agreement. These facts

clearly constituted a change of position and reliance on the agreement, under the cases cited, sufficient to raise the estoppel.

[7,8] We are well aware that in such cases the temptation is strong for those who are so inclined to fabricate evidence giving color to the claim that the parties entered into such an oral agreement as is here alleged. On the trial on the merits, the burden rests on the plaintiff to prove the oral agreement by full, clear, and convincing evidence. *Rolls v. Allen*, 204 Cal. 604, 269 P. 450; 69 Cor. Jur. p. 1304, § 2731. The mere fact that the wills are reciprocal or contain similar or identical provisions, or that they were executed at the same time and before the same witnesses, is not of itself sufficient evidence of the alleged oral agreement. *Rolls v. Allen*, supra; *In re Weir's Estate*, 134 Wash. 560, 236 P. 285. However, if such agreement is proved by full, clear, and convincing evidence, such agreement should be enforced according to its terms.

[9,10] The special grounds of the demurrer need receive but little consideration. Apparently it is respondents' contention that the alleged oral agreement is not sufficiently certain to warrant specific performance. It is also urged that it is not alleged that the consideration is adequate. The agreement, as alleged, is sufficiently certain, and the exact nature of the consideration moving to Carrie M. Notten (reciprocal promise from her husband) is set forth. It is not necessary that a complaint state in so many words that there was an adequate consideration for the contract or that the contract was just and reasonable. Standing alone, such allegations constitute but mere conclusions. It is sufficient to allege the facts from which these conclusions may be drawn. *Wolf v. Donahue*, supra, 206 Cal. 213, page 219, 273 P. 547; *Magee v. Magee*, 174 Cal. 276, 162 P. 1023.

Respondents also attack certain allegations of the complaint as being uncertain and ambiguous. Although, as already stated, the complaint is not a model of pleading, it is our opinion that the allegations challenged are sufficiently clear.

For the foregoing reasons, the judgment appealed from is reversed.

3 Cal.2d 615

SALOT v. STATE BAR OF CALIFORNIA.

S. F. 15283.

Supreme Court of California.

May 6, 1935.

1. Attorney and client ☞7

Applicant for admission to practice law had burden of showing that bar examiners' refusal to certify applicant was erroneous, unlawful, and discriminatory (St. 1931, p. 1761, § 24).

2. Attorney and client ☞7

Supreme Court will not inquire into inability of applicant for admission to practice law to pass bar examinations, and will not listen to his complaint, unless applicant can show that he was prevented from passing through fraud, imposition, or coercion, or that he was treated unjustly, and will not exercise power in contravention of adverse recommendation of committee of bar examiners unless applicant makes convincing showing that adverse recommendation is not based upon sound premises and valid reasoning (St. 1931, p. 1761, § 24).

3. Attorney and client ☞7

Applicant who had failed in seven successive bar examinations held not entitled to admission to practice law on ground that in two of examinations there was unfairness, arbitrariness, fraud, and dishonesty in marking and grading of applicant's answers, in view of record (St. 1931, p. 1761, § 24).

4. Attorney and client ☞7

Applicant who had failed in seven successive bar examinations, held not entitled to admission to practice law, although applicant argued his case before Supreme Court with commendable clarity and conciseness, since such performance of applicant could not be accepted as sufficient evidence of his general knowledge of law (St. 1931, p. 1761, § 24).

In Bank.

Petition by Henry Salot for admission to practice law, upon the filing of which the State Bar of California was cited to show cause why petitioner should not be admitted as an attorney at law.

Petition dismissed.

Henry Salot, in pro per., and Robert F. Shippee, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

The petitioner seeks to be admitted to practice as an attorney at law in California,

notwithstanding he has failed to be certified by the committee of bar examiners of the state bar (St. 1931, p. 1761, amending St. 1927, p. 41, § 24) as possessing the necessary legal requirements for admission. Upon the petition being filed, this court cited the state bar to show cause why this court should not admit petitioner as an attorney at law upon the showing made, notwithstanding lack of proper certification by the committee of bar examiners. The state bar has filed its return and produced all available records pertinent to the matter to be considered.

[1] This proceeding being in the nature of a review, the burden is on the petitioner to show wherein the decision of the committee of bar examiners is erroneous and unlawful, and unjustly discriminates against the petitioner.

[2] At the outset it may be stated that petitioner has consistently failed in seven successive bar examinations. This court will not inquire into petitioner's inability to pass any or all of such examinations, and unless he can show that he was prevented from passing the bar examinations through fraud, imposition, or coercion, or that he has been treated unfairly or unjustly, this court will not listen to his complaint. In re Investigation of Conduct of Examination for Admission to Practice Law, 1 Cal. (2d) 61, 33 P.(2d) 829. Nor will this court exercise its power in contravention of the adverse recommendation of the committee of bar examiners except upon convincing showing that "adverse recommendation is not based upon sound premises and valid reasoning." *Spears v. State Bar*, 211 Cal. 183, 192, 294 P. 697, 700, 72 A. L. R. 923.

[3] Petitioner relies specifically upon two examinations given by the committee of bar examiners, those of August, 1930, and August, 1932, as examinations wherein he claims there was unfairness, arbitrariness, fraud, and dishonesty in the marking and grading of petitioner's answers, thereby preventing him from attaining a passing grade.

As to the examination of August, 1930, the records show that it consisted of 30 essay-type questions, each graded on a basis of 10 points, or a total of 300 points. Prior to this examination there had been propounded usually 40 essay-type questions at each examination. At this examination, in an effort to produce a more comprehensive

examination, the experiment was tried of substituting, for 10 of the usual essay-type questions, 200 "Yes-No" questions, to be given in four groups of 50 each, each group to be graded on a basis of 50 points, making a total of 200 points, which was to be given a weight of 100 points, obtained in each instance by dividing by two the applicant's total on the four groups. The oral examination was to be graded on a basis of 100 and given a weight of 50 points, obtained in each instance by dividing the applicant's grade by 2. However, in view of the experimental nature of the "Yes-No" questions and the usual lack of uniformity of the oral examination, the committee decided, ultimately, as it had the power to do, that in fairness to all applicants, the "Yes-No" questions and the oral examination, as a basis of marking this examination, be abandoned and the examination graded solely on a basis of 10 points for each essay-type question, or a total of 300 points, the passing grade to be 69 per cent. or 207 points, with the added concession, that applicants receiving $206\frac{1}{2}$ points should be considered as having passed. The petitioner received $194\frac{1}{2}$ points, or 12 points less than the passing number. In what way this worked a discrimination against petitioner it is impossible to conceive; the same standard of marking being applicable to all candidates taking the examination. It is the petitioner's contention, based upon a misinterpretation of information given him by an employee, that taking the "Yes-No" questions, and the oral examination with the essay-type questions, he received a passing grade of 303 points. As pertinent to what happened at this examination, we quote from the affidavit of Delger Trowbridge, chairman of the committee of bar examiners at that time:

"That he was Chairman of the Committee of Bar Examiners of the State Bar of California from January 11, 1930 to June 30, 1931, during which time the August, 1930, bar examination was held and the results thereof determined.

"That the passing grade at said examination was fixed by the Committee of Bar Examiners pursuant to the authority vested in it at the time at 69 per cent of the total maximum grade of 300 points on the 30 essay-type questions given in said examination or 207 points, with the added provision that any applicant who received within one-half point of said 207 points, or $206\frac{1}{2}$ points, should also pass.

"That at said August, 1930, bar examination 200 'Yes-No' questions and an oral examination were also given, but in determining the success or failure of the applicants at said examination the Committee of Bar Examiners dropped out of consideration the 'Yes-No' questions and the oral examination, because of the experimental nature of the former and the lack of uniformity in the marking of the latter.

"That consequently the success or failure of an applicant at said examination turned entirely on his grade on the 30 essay-type questions and no person was declared to have passed the examination unless he received $206\frac{1}{2}$ points or more on said essay-type questions."

The petitioner states on information and belief that he received a passing grade in the August, 1930, examination, but beyond his own statement there is no proof, nor was any offered, that such was the fact. Even though it be admitted, which it is not, that he received a rating of 303 points on the 30 essay-type questions, in combination with the "Yes-No" questions, and oral examination, and that the passing grade was 273 points, it is shown that for sufficient reasons, and because of the experimental nature of the "Yes-No" questions and the absence of uniformity in the markings on the oral examinations, that in fairness to the applicants at that examination, it was determined that the written "Yes-No" questions and the oral examination be excluded from consideration and the markings based upon the 30 essay-type questions alone. This ruling applied to all applicants alike, including the petitioner, who as the record shows received a rating of only $194\frac{1}{2}$ when the minimum requirement was $206\frac{1}{2}$. The record further shows that had the rating been based upon all three types of questions, a minimum passing grade of 69 per cent. would have necessitated the making of $310\frac{1}{2}$ points, whereas, upon petitioner's own showing he received but 303 points.

In the August, 1932, examination we have the same confused affirmations, that petitioner received $2,322\frac{1}{8}$ points, that the passing grade was 2,345 points, or 70 per cent., that certain papers between 69 and 70 per cent., designated as border line cases, had been reviewed, including petitioners, who had attained a grade of 69 per cent., to ascertain if better markings could not be given to reach the required minimum per cent. of 70, but that petitioner's markings were not changed; that subsequently a re-

view of papers of applicants receiving marks from 65 per cent. to 69 per cent. was had, and the petitioner requested the chairman of the board of examiners that his paper be again reviewed, but was informed by the chairman that his paper, having fallen within the 69 to 70 per cent. classification, had already been reviewed and could not be reviewed again. The petitioner then petitioned the board of examiners for a second review, which petition was denied for substantially the same reason, and such second review we may assume would not only have been unfair to other applicants in the same classification as petitioner, but also would have resulted as did the first. The statement of petitioner that "he verily believes that had his examination papers been reviewed, he would have received a passing grade" is but a conclusion of the petitioner's, and the fact stands out that 52.7 per cent. of those who took the examination did pass. We are of the opinion on the state of the record before us that petitioner was accorded every privilege granted to all other candidates similarly situated, and upon equal terms with such other applicants. No facts are stated that would lead us to conclude that anything but sound premise and valid reason actuated the action of the committee of bar examiners.

The petitioner also alleges upon information and belief that answers to the essay-type questions were based upon what he erroneously calls "model answers" prepared beforehand for the guidance of the examiners, and that one of these so-called "model answers" was wrong, and that had he been credited with points in conformity with a correct answer that petitioner would have attained sufficient additional points to make a passing grade.

As to this contention, we quote from the return of the state bar: "There is no such thing as a 'model' or 'proper' answer to any question given at any bar examination. We refer the court to paragraph II of the Return of the Board of Governors and the Committee of Bar Examiners of the State Bar in Miscellaneous No. 1280, 'In the Matter of Investigation of the Conduct of Bar Examination', and to Exhibits 4, 5 and 7 filed in support thereof, and to subparagraph 3 of paragraph IV of said Return, for a further statement of the facts with respect to the alleged 'model' answers. At page 4, line 4, of said Return it is said: 'As will appear from Exhibit 5 setting forth the instructions given to the readers, no model

answers were used in connection with said examination, for the reason that in fairness to the applicants their answers were evaluated on the basis of the knowledge of the points of law involved and the power of reasoning exhibited in the answer rather than in accordance with any model or set form of answer.' The same instructions were given with respect to the grading of the papers of the applicants who took the August, 1932, examination of which petitioner complains."

As unsubstantial is the allegation of petitioner that said board of bar examiners has at all times failed and refused to assist the petitioner in ascertaining the true situation with respect to his examinations and grades. An examination of the entire record refutes such a contention, and on the contrary shows that much of the complaint of petitioner is based upon a zealous effort on the part of the employees of the state bar to furnish petitioner with all information they thought could be useful to petitioner even to the extent of stepping over the border line of information properly available to applicants and giving information which petitioner misinterpreted and upon which he bases his claim of unfair treatment. We are satisfied petitioner was afforded every means of ascertaining the situation with respect to his examination and his grades. Unfortunately, any question with reference to the correctness of any answer is now necessarily moot because the answers of petitioner to questions propounded at the several examinations petitioner has taken have been destroyed in common with the answers of all other applicants pursuant to the custom of destroying all examination books subsequent to the 4-month period of inspection open to applicants following the declaration of the results of the examination, a custom compelled by lack of storage facilities of the state bar offices; there being between ten and twelve thousand books at each examination. Statements of petitioner that such records were deliberately destroyed by the secretary of the state bar to thwart petitioner in his effort to secure further consideration of his petition are unjustifiable. Careful consideration of the record refutes the claim of petitioner that he has been made the victim of unfairness, arbitrariness, fraud, and dishonesty in the marking and grading of his papers. So is petitioner's claim of having been unjustly discriminated against, which is utterly without merit, the only semblance of verity being based upon petitioner's misinterpre-

tation of information purported to have been received from transient employees and not from members of the committee of bar examiners of the Board of Governors of the state bar.

[4] The argument of petitioner of his case before this court was performed with commendable clarity and conciseness, but we cannot accept such as sufficient evidence of his general knowledge of the law, especially in view of his repeated failures to pass examinations which others have passed.

The petition is dismissed.



3 Cal.2d 636

ROBINSON v. MORAN.

S. F. 15329.

Supreme Court of California.

May 21, 1935.

1. Municipal corporations ☞898

Municipal treasurer has duty to pay out money only on warrants signed by persons designated by law as proper persons to sign warrants (St. 1933, p. 1335, § 876).

2. Mandamus ☞169

Police chief's petition for mandamus to compel payment of salary warrants would be dismissed without prejudice where from allegations in answer it might be deduced that doubt existed whether body purporting to act as city council was in fact duly elected and qualified, and issues of fact presented might more readily be determined by appropriate proceeding in superior court (St. 1933, p. 1335, § 876).

In Bank.

Mandamus by Glenn D. Robinson against John J. Moran, as treasurer of Crescent City.

Proceeding dismissed.

John L. Childs, of Crescent City, and James A. Himmel, of San Francisco, for petitioner.

H. A. Postlethwaite, of San Francisco, and G. Fletcher Dodd, of Crescent City, for respondent.

PER CURIAM.

This is a proceeding in mandamus by which the petitioner, who alleges that he is the chief of police of Crescent City, seeks to compel the respondent, as treasurer of said city, to pay two warrants alleged to have been regularly issued to petitioner and purporting to cover his salary for the months of July and August, 1934. By way of return to the alternative writ heretofore issued, the respondent has demurred generally and filed an answer, the latter pleading denying many of the material allegations of fact contained in the petition. He denies that petitioner is the duly appointed, qualified, and acting chief of police of Crescent City, denies that the warrants issued to petitioner are of any force or effect or constitute any charge upon the funds of the city, and denies that said warrants have been audited, approved, or ordered paid by the city council. The answer then contains a series of allegations from which it may be deduced that some doubt exists as to whether the body purporting to act as the city council is, in fact, the duly elected and qualified legislative department of the city government.

[1, 2] Under the pertinent section of the Municipal Corporation Bill (2 Deering's Gen. Laws, 1931, Act 5233, p. 2915, § 876, as amended in St. 1933, p. 1335), it is the duty of respondent treasurer to "pay out moneys only on warrants signed by persons designated by law as the proper persons to sign warrants and not otherwise. * * *" We are here confronted with several issues of fact having to do with the title to office of both petitioner and the city council which purported to approve his claim for compensation. While it has been held that title to office may be inquired into and determined, when incidentally involved in a proceeding having for its purpose the enforcement of a specific duty enjoined by law (*Barendt v. McCarthy*, 160 Cal. 680, 683, 684, 118 P. 228; 16 Cal. Jur. 792, § 22), we are of the opinion that the several issues of fact presented in this proceeding may more readily be determined in the superior court wherein exists facilities for the expeditious disposition of such matters.

The present proceeding is, therefore, dismissed without prejudice to the institution in the superior court of an appropriate proceeding for similar relief.

**BRENNAN et al. v. AMERICAN TRUST
CO. et al.**
S. F. 15009.

Supreme Court of California.

May 21, 1935.

Rehearing Denied June 20, 1935.

1. Mortgages ⇨504

Mortgagors *held* not entitled to enjoin foreclosure sale on ground that due to economic depression market for sale of realty was poor and sale would be inequitable.

2. Appeal and error ⇨781(4)

Proceeding to enjoin foreclosure sale *held* moot after sale had been made.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by John J. Brennan and another against the American Trust Company and others. From a judgment for defendants after a demurrer to the complaint was sustained, plaintiffs appeal. On motion to dismiss the appeal and affirm the judgment.

Motion granted and judgment affirmed.

Crittenden & Bingaman, of San Francisco, for appellants.

Redmond C. Staats, of Berkeley, and Brobeck, Phleger & Harrison, of San Francisco (J. Jeff Cowen, Jr., of Berkeley, of counsel), for respondents.

PER CURIAM.

Motion to affirm judgment.

[1] Plaintiffs owned property subject to a deed of trust in the sum of \$6,200. They filed a complaint on May 12, 1933, alleging that defendant American Trust Company was threatening to sell the property, and further alleging that due to the economic depression the market for the sale of real property was poor and a sale would be inequitable. The prayer was for an injunction against sale. A demurrer to the complaint was sustained and judgment rendered in favor of defendants. While the proceeding was pending, the property was sold by the trustee. Defendants herein have moved to dismiss the appeal and affirm the judgment.

Not even the statutory changes in 1933, which regulate sales where deficiency judgments are sought, would, if they were applicable, authorize the relief sought here by plaintiffs. Neither legislation nor judicial

decision in this state warrants interference with the normal course of a sale under a deed of trust, conducted in compliance with the law and without fraud.

[2] It would appear, moreover, that the actual sale of the property renders this injunction proceeding moot.

The motion is granted and the judgment is affirmed.



6 Cal.App.2d 522

WALDORF et al. v. CITY OF ALHAMBRA.

Clv. 10237.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Pleading ⇨34(1)

In determining effect of pleading, allegations thereof must be liberally construed with view to substantial justice between parties.

2. Automobiles ⇨259, 279

City *held* not liable for death of passenger in automobile which collided at night with pole in parkway after crossing intersection where street became narrower by 14 feet, on theory that such narrowness, combined with absence of lights or warnings, constituted defective condition of streets within statute imposing liability upon city for injuries resulting from such condition (Gen. Laws 1931, Act 5619).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Frank A. Waldorf and another against the City of Alhambra. From a judgment that plaintiffs take nothing by their complaint, plaintiffs appeal.

Affirmed.

William Dellamore, of Los Angeles, and Leslie K. Floyd, of Modesto, for appellants.

James B. Ogg, of Alhambra, for respondent.

WILLIS, Justice pro tem.

Plaintiffs, father and mother of Helen Amy Waldorf, deceased, brought this action against the city of Alhambra for damages alleged to have resulted from the death of their daughter which was caused by a collision between the automobile in which she was riding in the nighttime, with a pole in the parkway of a city street near its in-

tersection with another street in the city of Alhambra. At the beginning of the trial, defendant objected to the introduction of any proof in support of the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The objection was sustained, the jury was dismissed, and judgment was entered that plaintiffs take nothing by their complaint, from which judgment plaintiffs appeal.

The sole question herein, therefore, is whether the complaint states facts sufficient to attach an actionable liability to the municipal corporation defendant under the provisions of statute enacted in 1923 (Act 5619, Deering's Gen. Laws, 1931, p. 3052), wherein municipalities were made liable for injuries to persons and property resulting from the dangerous or defective condition of "public streets * * * grounds, works and property" in all cases where the governing body or person having authority to remedy such condition had knowledge or notice of the defective or dangerous condition of any such street, grounds, works, or property, and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition. Section 2.

[1,2] In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. In *re Estate of Wickersham*, 153 Cal. 603, 96 P. 311. In accordance with this rule, we are asked to construe the complaint herein as charging that a dangerous and defective condition existed at the intersection of two public streets in the city of Alhambra, based on the following allegations of facts: Alhambra road, running easterly and westerly, was intersected by Fremont avenue, running northerly and southerly; each street being bordered by a concrete curb on each side thereof and paved from curb to curb. That part of Fremont avenue beginning from the southerly curb line of Alhambra road is approximately 14 feet narrower than that part of Fremont avenue extending northerly from said Alhambra road; the concrete curbing on the westerly side of Fremont avenue south of Alhambra road being approximately 14 feet easterly of the concrete curbing on the westerly side of said avenue northerly of said road. There were no lights, barriers, signs,

notices, watchmen, or warnings of any kind or character to give notice to or to warn motorists or pedestrians of the narrowness of Fremont avenue south of Alhambra road. After appropriate and sufficient allegations of knowledge and notice of such condition of said streets, it is alleged that on December 24, 1933, at 4 o'clock a. m., deceased was riding in an automobile with another who was operating the same southward on Fremont avenue towards Alhambra road, that, when it arrived at the latter street, the driver continued to drive across the intersection, and that, by reason of the fact that there were no lights, barriers, signs, notices, watchmen, or warnings of any kind or character at or near said intersection to warn or give notice of said narrowness of Fremont avenue to the south of Alhambra road, the driver was caused to drive, and did drive, said automobile upon and over the curbing on the southerly side of said Alhambra road and against a wooden pole imbedded in the ground on the westerly side of Fremont avenue and westerly of the curb line thereof and about 20 feet southerly from the southwest corner of said streets, as a result of which collision the deceased suffered injuries resulting in her death on the same day. Appropriate and sufficient allegations of presentation of a claim in due form and time to the proper board and officers are made. The case was heard and determined by the trial court and presented, argued, and submitted to this court upon this single proposition: Are the facts relating to the condition of the streets at the intersection as stated in the complaint sufficient to constitute a dangerous or defective condition as contemplated by the provisions of the act of 1923 above referred to?

It has been heretofore held that, when dealing with cases falling under the terms of this act, each of such cases must depend upon its own state of facts; and so varying are the factors which contribute to produce a result that no hard and fast rule may find practical application to the great majority of cases. *Rafferty v. City of Marysville*, 207 Cal. 657, 280 P. 118. Without attempting, therefore, to state a rule that would have general application, but only to a state of facts substantially as related in the complaint herein, we are of the opinion that the facts as stated in the complaint herein are not sufficient to show a dangerous or defective condition of the streets, ground, or property under the control of the city of Alhambra at the intersection described, as

defined, embraced, or contemplated by the provisions of the act of 1923. In *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 P. 266, 35 L. R. A. 267, the court states that the control of streets by city authorities is "not open to question by the courts." The acquisition, construction, maintenance, and repair of roads and highways are undisputed functions of government. *Ferguson v. Gardner*, 86 Cal. App. 421, 431, 260 P. 961. "Moreover, the rule is general that the liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence only, that it is not an insurer of the safety of travelers, but is required to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them in a proper manner, and that contributory negligence precludes a recovery." *Brooks v. City of Monterey*, 106 Cal. App. 649, 654, 290 P. 540, 543. Under the law, the city of Alhambra, in the exercise of its governmental function and discretion, was not required to widen Fremont avenue south of Alhambra road to correspond with the width of that avenue north of such road, and is not actionably liable for its failure so to do. Nor do we think that the city is chargeable with liability in failing to maintain barriers, lights or warning signs or notices at the point of "offset" or "jog" in the street. In almost every city of size in this state some streets are laid out and improved without uniformity as to width or direction, resulting in so-called "jogs," "offsets," or "goosenecks," some ending at cross streets and some even forming cul-de-sacs. We are convinced that the law does not require a municipality to maintain either barriers or warning devices at "jogs" or "offsets" of the construction, nature, and appearance of that described in the complaint herein. To the prudent operator of a motor vehicle, acting within the scope of the law governing his own conduct in traversing a public street in the nighttime, the pavement, curb, sidewalk, and the parkway with the trees or poles therein constitute a barrier or warning sufficient to avert disaster and as readily visible to the alert driver as a sign informing him of the condition; there being nothing to conceal the real condition nor to deceive the operator of an approaching automobile while driving at a lawful rate of speed and with due caution.

While we have not been furnished with, nor have we found any, California cases which have directly passed upon the peculiar question here before us, we have ample sup-

port for the conclusions above expressed in the cases of *Greenland v. City of Des Moines*, 206 Iowa, 1298, 221 N. W. 953, and *Clinkenbeard v. City of St. Joseph*, 321 Mo. 71, 10 S.W.(2d) 54, 61 A. L. R. 242, in each of which the facts are strikingly similar to those herein. We find nothing in the cases of *Brooks v. City of Monterey*, supra, and *Bennett v. Kings County*, 124 Cal. App. 147, 12 P.(2d) 47, cited and relied upon by appellants, which conflicts with the views herein expressed. Those cases were tried and reviewed on their own peculiar facts, readily distinguishable from those set forth in the complaint herein.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 118

FEDERAL MUT. LIABILITY INS. CO.
(WINCHESTER, Intervener) v. DAILY
et al.

Civ. 8579.

District Court of Appeal, Second District,
Division 1, California.

May 22, 1935.

Automobiles ⇨244(20)

Evidence justified judgment for defendant when sued for death of occupant in truck collision on ground that defendant's truck was traveling at not more than 12 miles per hour after entering intersection and that defendant used reasonable diligence to slow down when he found other truck, which was on wrong side of street, was approaching rapidly.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Federal Mutual Liability Insurance Company against O. C. Daily and Grady L. Hayter, copartners doing business under the name and style of Daily & Hayter, in which Mildred Jones Winchester intervened. From a judgment for defendants, intervener appeals.

Affirmed.

John J. Craig, of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondents.

CONKEY, Presiding Justice.

This action was brought to recover damages for the wrongful death of one John Winchester, alleged to have been caused by the negligence of defendant Hayter in his operation and management of a Kimball truck. The accident was brought on by a collision between the Kimball truck and a Ford truck in which Winchester was riding as guest of William F. Lyman, driver of the Ford truck.

According to the bill of exceptions, the case was submitted to the trial court on the evidence, "and none other," contained in the testimony of the defendant Hayter, called as witness for the plaintiff. The court found that the defendants were not negligent; also that the sole and proximate cause of the injuries and death of Winchester was the negligent operation of the Ford truck by Lyman, whereby the Ford truck collided with the left side of the Kimball truck. Judgment was entered in favor of the defendants. The intervener appeals.

We may assume, in accordance with the contention of appellant, that the negligence of Lyman may not be imputed to his guest, Winchester, under the facts of this case. The judgment therefore rests wholly upon the finding that the collision was not caused by any negligence of the defendants.

On this issue, appellant in her bill of exceptions specifies that the evidence is "insufficient to justify the judgment," in that the evidence "establishes beyond a question negligence on the part of the defendants, which negligence directly and proximately caused the death of John Winchester."

A reading of the brief testimony of the witness Hayter, which is the entire evidence produced at the trial, very clearly reveals the situation in which the drivers of these two trucks found themselves at and immediately preceding the moment of collision. The court was justified in deciding, as apparently it did decide, that the defendants' truck after it came into the intersection was traveling at a speed of not more than twelve miles per hour, and that the defendant driver used reasonable diligence to slow down the motion of his truck when he found that the Ford truck, which was "on its wrong side of the street," was approaching rapidly.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

TREMAINE v. PHOENIX ASSUR. CO. et al
Civ. 9689.

District Court of Appeal, First District,
Division 2, California.

May 1, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Insurance ⇨273

Generally, insured need not communicate to marine insurer such facts as are covered by a warranty, express or implied, but the rule is subject to exceptions, such as facts relating to unseaworthiness of vessel (Civ. Code, §§ 2564, 2569, 2582, 2681).

2. Insurance ⇨273

Where at time marine insurance covering engines on barge was modified to permit longer voyage, barge was, and for four months had been, at bottom of channel, engines were in need of repairs and were unable to function without them, failure to communicate such facts to insurers constituted concealment, which was complete defense to action on policies (Civ. Code, §§ 2564, 2569, 2582, 2681).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by B. Carl Tremaine against Phoenix Assurance Company and others From a judgment for plaintiff, defendants appeal.

Reversed, with directions.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Carroll Single and Stanley J. Cook, both of San Francisco, for appellants.

John L. Schaefer, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff sued to recover on several insurance policies. The defendants denied certain allegations contained in the complaint, and each company pleaded two affirmative defenses, concealment and that the barge insured was not seaworthy. As to the first affirmative defense, the trial court found the facts as alleged by the defendants. As to the other affirmative defense, it found the probative facts, but did not find on the ultimate fact. Continuing, it made conclusions of law in favor of the plaintiff. At this time the defendants contend that the judgment should be reversed, and that the trial court should be directed to enter judgment for the defendants. That contention, we think, must be sustained.

The things insured were the engines on a barge, W. T-B No. 60. The barge was, and for several years had been, at San Quintin, Mexico. In 1929 it was insured. In 1930 the insurance was renewed. By the terms of the policy the movements of the barge were limited to a zone having a radius of seven miles in and about San Quintin. Desiring to take the barge to San Francisco, the owners applied to have the policies modified. That matter was taken up in 1930, and the modification was accomplished March 13, 1931, upon the payment of an additional premium. Among others, the court made the following findings:

"That it is true that at the time said W. H. Worden applied for and obtained the extended insurance herein concerned, said barge was located in the harbor of San Quintin, Mexico. Said barge was then and there lying on the bottom of the channel in about twenty-one (21) feet of salt water, with her aft hold and engine room submerged, and had been so situated for at least four (4) months prior to that time. That thereafter the said W. H. Worden caused the said barge to be refloated and in so doing caused to be cut two small holes in her main deck through which pumping hose was inserted for the purpose of de-watering the said craft. Said barge and its two main Diesel engines were then and there in need of repair and were unable to function without such repairs. That a tail shaft to one of the engines was broken. That all of said facts and conditions were known to said W. H. Worden at the time the application for the extended insurance was made by said W. H. Worden to M. Thompson & Company. That M. Thompson & Company were marine insurance brokers in the city of San Francisco, California, and secured the said policies of insurance at the request of W. H. Worden. That in securing the said extended insurance, said M. Thompson & Company disclosed such facts as are represented in certain documents now in evidence to Bowring & Company, marine insurance brokers of London, England. That no other facts were then known to defendants, or any of them, save facts contained in said documents, which facts were the only facts disclosed to C. T. Bowring & Company, brokers, in London, England." An examination of the documents referred to in the last two sentences of said findings shows that they are silent as to the then condition of the barge. The defendants quote finding XI and cite the foregoing facts and contend that the trial court should have drawn

conclusions of law therefrom in their favor and should have ordered judgment for them. The plaintiff makes no direct reply. He propounds six questions. Not all of them are pertinent to the record. We must confine ourselves to an attempt to determine the questions presented by the record.

Under the facts recited above, M. Thompson & Co. was acting as the agent of the insured; and C. T. Bowring & Co. was acting as the agent of M. Thompson & Co. The most that can be said is that Mr. Worden disclosed to M. Thompson & Co., his own agent, the facts. But there is no evidence that any of the facts happening after the original policies were written were communicated to the insurers.

[1] In every marine insurance a warranty is implied that the ship is seaworthy. Civ. Code, § 2681. That rule applies to a modification of a contract of insurance as well as to the original contract. Civ. Code, § 2582. As a general rule, unless inquiry is made, the insured need not communicate such facts as are covered by a warranty, express or implied. Civ. Code, § 2564, subd. 3; II Duer on Insurance, p. 572 et seq. But to that rule there are well-defined exceptions. In II Duer on Insurance, at page 435, the author says:

"But, although where the assured acts with an entire good faith, he is not bound to make any communication relative to the condition of the ship, it by no means follows, that when he knows, or has positive information, that the vessel is unseaworthy, the implied warranty of seaworthiness will justify him in procuring an insurance, without disclosing to the underwriter his knowledge or information. An unseaworthy ship, it is not to be doubted, may be insured. When the facts are made known to the underwriter, he may, for a premium that he deems to be adequate, assume the risk; but the attempt to cast upon him such a risk, without his knowledge or consent, is an evident fraud, and it is this fraud that the assured, by his concealment, in the cases I have supposed, attempts to practice. It is his fraudulent design to charge the underwriter with a loss, not justly recoverable under the policy. His expectation must be, that in the event of a loss, the underwriter will not be able to defeat its recovery by evidence, that the implied warranty of seaworthiness had been broken; for if he had believed that the facts known to himself would be discovered by the underwriter, it is certain, that he would not have effected the policy. He would not

have paid a premium for an insurance, that he knew, could in no event avail to his indemnity. Hence, a policy, where the ship is unseaworthy, and the fact is known to and suppressed by the assured, is conclusive evidence of a meditated fraud.

"It may possibly be thought that these remarks, admitting them to be just, have no practical value, since, where the underwriter rests his defense on the unseaworthiness of the ship, if the fact is established, he is discharged, and an inquiry into the knowledge of the assured, at the time the policy was effected, becomes immaterial; but this is a mistaken view of the subject. Where a breach of the implied warranty is proved, it may still be material to prove the fraud, and where no such breach is shown, the fraud may still exist, and the proof be given to avoid the policy. If the ship was, in fact, unseaworthy when the risk commenced, the breach of the implied warranty would prevent the policy from attaching, and in cases exempt from fraud, where the policy has not attached, the assured is entitled to a return of the premium. But if the facts that falsify the warranty were known to the assured when the policy was effected, his fraud, in the concealment, might properly be shown to bar his recovery of the premium." According to the note in the commissioner's edition of the Civil Code, section 2569 thereof, is a statement of that same rule. In the case of *Hamblet v. City Ins. Co.* (D. C.) 36 F. 118, a set of facts almost parallel to the facts we have recited was involved. The *De Smett*, at the time the insurance was written, was in need of major repairs and could not run at all. The owner applied for insurance and did not disclose the disabled condition of the vessel. Shortly after the insurance was written the vessel burned. The owner sued to recover on the policy. He was denied relief. In 36 F. 118, on page 122 the court said:

"But if the evidence justified a different conclusion, could the libellant succeed in this suit? The applicant for insurance upon the steamer *De Smett* was certainly bound to disclose to the underwriter all matters within her knowledge material to the risk. *Kohne v. Insurance Co.* [Fed. Cas. No. 7,922] 1 Wash. C. C. 158; 1 Phil. Ins., §§ 531, 537, 546. Under the proofs, Gilbert Raine must be treated as the representative of Mrs. Harry in effecting the insurance, and by his conduct in that behalf she is bound. Story Ag. § 31. A broker em-

ployed to procure insurance must be regarded in that matter as the agent of the party who so employed him; and his concealment from the underwriter of any material fact, whether the suppression be unintentional or willful, is the concealment of his principal. Whart. Ag. § 708; May, Ins., §§ 122, 123. Now, I have no hesitation in holding that the damaged and broken condition of the *De Smett*, and her situation generally, as hereinbefore described, were facts materially affecting the risk, and should have been disclosed to the defendant. This conclusion I have reached without regard to the opinions to that effect of the underwriters who were examined as experts. This was not the case of a vessel undergoing ordinary repairs. The injury which the *De Smett* had sustained was unusual, and most serious; and all the circumstances of the case were peculiar and extraordinary. So disabled was the boat that she was absolutely incapable of running. The dealings of the parties here, even in the absence of express stipulation, could be fairly referred only to a steam-boat at least reasonably fit to be navigated." In the case of *Russell v. Thornton*, 4 H. & N. 788; 157 Eng. Rep. Reprint, 1053, the owner of a disabled vessel negotiated insurance thereon. The vessel was lost and he sued to recover on the policy. Before he applied for the insurance he was advised the vessel was aground. That fact was not disclosed to the insurer. In sustaining the judgment of the trial court in favor of the defendant, in 157 Eng. Rep. Reprint, 1053, at page 1057, the court said:

"We are all of opinion that the defendant is entitled to judgment. The first question is, whether the letter of the 6th of January, 1857, was a material one to be communicated to the defendant by the plaintiff. As to that, there really is no doubt about it. It is impossible to contend that a letter stating the fact of the vessel having been on shore for twenty-two hours, beaten about by the wind and the waves, and in such a condition as to be in a sinking state when she was got off, is immaterial; or that the fact was one upon which the underwriters had not a right to form an opinion in taking a risk upon a policy in which there was no warranty of seaworthiness. It would have been all-important, even if there had been a warranty of seaworthiness. The underwriters might well say, 'You may patch her up, and make her seaworthy, but she will never be as good a ship as she was before she met with this calamity.' It

was therefore obviously a letter that ought to have been communicated to the defendant." As to the rule in general, it is stated in 38 C. J. 1051, as follows: "Contracts of marine insurance are uberrimae fidei and there is an obligation voluntarily to disclose all facts and circumstances which are material to the risk and not within the knowledge of both parties. This obligation is not limited to disclosures to be made by insured but includes also the underwriter." On error, the case later came before the Exchequer Chamber, 158 English Reports Reprint, 58. At page 60 the court said: "As to the first count, we are all of opinion that there was no waiver of the omission to communicate the information material to the risk, because a person cannot waive that which he does not know; and it was not until after the policy was effected that the defendant became aware of the state of the ship." See, also, III Joyce on Insurance, § 1768; II Duer 380. The latest expression on the subject that has been called to our attention is contained in *Btresh v. Royal Ins. Co., Limited, of Liverpool* (C. C. A.) 49 F.(2d) 720, 721, where it is said: "It is not necessary that the assured should intend a fraud upon the underwriter; his duty is positive to disclose." The author of the passage, quoted from 38 C. J. 1051, in his notes cites a long list of authorities. Among others, he cites *Hart v. British, etc., Ins. Co.*, 80 Cal. 440, 22 P. 302. While not directly in point, the principle involved in the instant case was passed on in that case. Hart owned a cargo of wheat which was supposed to be en route from Colusa to San Francisco on board of a barge. On the morning that Hart thought the barge should arrive he commenced to make inquiries. He heard a barge had been lost at the north end of the bay. At once he called on the defendant and applied for insurance. At no time did he disclose the information he had received about a barge having been lost as above stated. The defendant issued its policy, but later it denied liability under it. The plaintiff sued to recover under the policy, and the defendant pleaded a failure to disclose. From a judgment in favor of the defendant, the plaintiff appealed. The court cited sections 2561-2563 of the Civil Code and held that the evidence sustained the judgment. In the case of *General Acc., etc., Corp. v. I. A. C.*, 196 Cal. 179, 237 P. 33, the liability of the plaintiff under its policy to indemnify Vessels, an employer, was involved. After one of his employees,

Lilenquist, had met with an accident from which he died, and after Vessels knew of the fact, he called at the office of the petitioner's representative, paid the premium, and took delivery of his policy. But he did not disclose the fact that the accident had happened. The court held the facts showed concealment. In 196 Cal. 179, at page 189, 237 P. 33, 36, the court said: "Section 2563, supra, was applied by this court in *Hart v. British, etc., Ins. Co.*, 80 Cal. 440, 22 P. 302, an action to recover upon a policy for marine insurance upon a barge and a cargo of wheat. The applicant for insurance had information concerning the probable loss of the barge, but failed to communicate this information to the insurance company. As a matter of fact, the barge was lost at the time the policy was issued. No inquiry was made by the insurance company as to the safety of the barge and cargo, but the court nevertheless held that the failure on the part of the insured to communicate the information in his possession to the insurer constituted a concealment of a material fact which the assured was bound to communicate, and this failure entitled the insurance company to rescind the contract of insurance." Further down on the same page, the court quoted with approval as follows: "In California, etc., *Co. v. New Zealand Ins. Co.*, 23 Cal. App. 611, 138 P. 960, it was held: 'Rescission is not the exclusive remedy of one who has become entitled to avoid a contract by reason of acts or omissions of the other party to it which are fraudulent in their nature. He may cancel the contract by its rescission; or he may seek affirmative relief in a court of equity for any injury sustained by the wrongful act or omission of the other; or he may set up the fraud by way of defense to an action brought to enforce the apparent liability.'" See, also, *Strangio v. Consolidated Indemnity & Ins. Co.* (C. C. A.) 66 F.(2d) 330.

[2] While the last three cases did not involve marine risks, it will hardly be contended that as to the latter the rule is less stringent than in other lines of insurance. We therefore conclude that the facts concerning the submersion of the barge at San Quintin, its injuries, and its need of repairs, were material subjects and should have been disclosed to the defendants, but, as they were not, such failure constituted, within the law, concealment, and, as such, a complete defense.

The plaintiff cites and relies on California *Co. v. New Zealand Ins. Co.*, 23 Cal. App.

611, 138 P. 960. An examination of that case discloses that the facts were materially different from the facts in the instant case. Nothing we have said is at variance with it. On the other hand, the case has much in favor of the case as made by these defendants.

The judgment is reversed, and the trial court is directed to enter judgment on the findings as made in favor of the defendants.

We concur: NOURSE, P. J.; SPENCE, J.



7 Cal.App.2d 160

MORELAND v. LANGWORTHY et al.

Clv. 8594.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1935.

1. Trial 165

In action against driver and owner of automobile for injuries sustained by guest, trial court on motion for nonsuit could determine whether there was any evidence of gross negligence or willful misconduct of driver.

2. New trial 157

Determination of effect of affidavits, offered on motion for new trial to show newly discovered evidence, is ordinarily within trial court's discretion.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Roland H. Moreland, as administrator of the estate of E. W. Weller, deceased, against H. I. Langworthy and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Derthick, Cusack & Ganahl, of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondents.

YORK, Justice.

This action was brought by plaintiff, as administrator of the estate of E. W. Weller, deceased, on behalf of his heirs to recover damages for the death of Weller, while riding as a guest in an automobile driven

by defendant Langworthy and owned by defendant Bowman, doing business under the name of Bowman Motor Company.

Appellant makes two statements as to questions involved on this appeal, but we will adopt his statement under points of appeal as being the real grounds attempted to be raised by appellant:

"1. In a jury trial, where negligence is proven, may the court determine the degree of negligence, whether gross or ordinary, on a motion for a nonsuit, or in such a case is it not the function of the jury under proper instructions by the court to determine the degree of negligence?

"2. A new trial should be ordered upon the ground of newly discovered evidence presented by affidavit on motion for new trial."

[1] In the argument used by appellant, he seems to predicate it on the fact that the court on a motion for nonsuit cannot take from the jury the question of determining the degree of negligence. However, appellant overlooks the point that in order to establish appellant's cause of action, where it was admitted by all parties that the deceased was a guest rider, it is the duty of the court on a motion for nonsuit to determine if there was any evidence showing liability. It was necessary for plaintiff to introduce evidence to prove gross negligence, willful misconduct, or the alleged intoxication of defendant Langworthy. An examination of the record presented for our consideration discloses the fact that there was no evidence of intoxication of the driver and no evidence upon which a finding of gross negligence or willful misconduct could be predicated.

[2] As to the second point raised by appellant, determination by the court of the effect of the affidavits offered as tending to show gross negligence is a matter ordinarily within the discretion of the trial court. In view of all the evidence that was introduced at the time of the trial, and of the counter affidavits used on the motion for new trial, we cannot say that there was any abuse of discretion on the part of the trial court in denying the motion for new trial.

The court was justified in granting the motion for nonsuit.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

FORBIS et al. v. HOLZMAN.*

Civ. 8825.

District Court of Appeal, Second District,
Division 1, California.

May 8, 1935.

Hearing Granted by Supreme Court
July 5, 1935.

1. Evidence ⇨571(9)

Physician's testimony in answer to hypothetical question that in his opinion patient's death resulted from asphyxiation in administering anaesthetic during operation held without weight as based on palpably deficient and false hypothesis.

The hypothetical question assumed that patient's blood pressure readings were not unusual during normal anaesthesia, but omitted last reading, showing marked drop before cessation of respiration, and did not assume normal respiration before cessation thereof, as evidence showed, and witness' opinion was based partly on assumption, unsupported by testimony, that cyanosis occurred before respiration ceased.

2. Evidence ⇨555

Expert witness' opinions, based on essential facts not in evidence, facts directly contrary to evidence or statements omitting important facts, as to cause of patient's death, are properly rejected as evidence, though neither questions asked nor answers are intentionally unfair.

3. Evidence ⇨553(1)

Very considerable latitude is allowed in statement of hypothetical facts calling for expert witnesses' opinions.

4. Evidence ⇨553(2, 3)

Statement of hypothetical facts in question to expert witness need not include all facts testified to and may assume facts most favorable to theory of party asking question.

5. Evidence ⇨553(4)

There may be allowable variation between facts assumed in hypothetical question to expert witness and actual facts proven.

6. Evidence ⇨555

Opinion evidence lacking true foundation of fact is incompetent.

7. Evidence ⇨555

Finding, based wholly on incompetent opinion evidence without true foundation of fact, is without support.

8. Evidence ⇨553(1)

Greatest care should be exercised to guard against fallacious and misleading opinion evidence in submitting to jury questions calling for scientific and technical elucidation.

9. Appeal and error ⇨1048(3)

Admission of physician's incompetent opinion testimony, based on deficient and false hypothesis, that patient's death was caused by suffocation in administration of anaesthetic without sufficient oxygen by defendant in malpractice suit, held prejudicial error requiring reversal of judgment for plaintiff.

Testimony was conflicting as to whether defendant held mask on patient's face, without keeping his fingers under edges to allow patient to breathe oxygen from air, during interval between disconnection of oxygen tank and connection of another tank, and all witnesses who observed operation testified that patient's respiration ceased almost simultaneously with defendant's call for fresh oxygen.

10. Evidence ⇨558(12)

Physician's testimony that operating surgeon had no opportunity to observe drop in patient's blood pressure just before her respiration ceased in answer to question on redirect examination as to witness' reasons for his statement on cross-examination that his opinion that death of patient, to whom defendant in malpractice suit administered anaesthetic, was caused by asphyxiation would be same if he assumed such drop, to which surgeon testified, held inadmissible as evasive and casting doubt and suspicion on surgeon's testimony in unwarranted manner.

11. Evidence ⇨558(5)

Questions assuming that defendant in action for death of patient, to whom defendant administered anaesthetic during operation, held mask "tightly" on patient's face, held improper on cross-examination of defendant's experts, in view of conflicting testimony on such question.

HOUSER, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Frank H. Forbis and another against Ralph R. Holzman. Judgment for plaintiffs, and defendant appeals.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellant.

Simpson & Simpson and W. E. Simpson, all of Los Angeles (Troy Pace, of Los Angeles, of counsel), for respondents.

SHINN, Justice pro tem.

Plaintiffs herein, the surviving husband and daughter of Beulah Forbis, deceased,

brought this action to recover damages for her death, alleged to have been caused by the negligence of defendant. The complaint alleged the employment of defendant as a physician and surgeon to administer an anaesthetic during an operation for the removal of the appendix and drainage of the gall bladder of Beulah Forbis. The alleged negligence consisted of the giving of the anaesthetic in such manner that an insufficient supply of oxygen was administered with ethylene gas, carbon dioxide gas and ether to prevent asphyxiation and to maintain life, as a result of which, it is alleged, said Beulah Forbis met her death by suffocation.

The patient was anaesthetized by defendant. The operation was performed by a surgeon and the incision was being closed when it was noticed that the anaesthesia had become too light. The operating surgeon requested of defendant a deeper anaesthesia. It was then noticed by defendant that the oxygen from the oxygen tank was being depleted at a rapid rate. He called for a fresh supply of oxygen, which was provided by an orderly employed by the hospital. The time required to get the other tank and connect it was approximately five minutes. During that time the ethylene gas was not shut off, the mask under which it was being administered remained on or over the patient's face, and she continued under the anaesthesia. At about the time the fresh supply of oxygen was administered, the patient ceased to breath and life became extinct.

Appellant challenges the sufficiency of the evidence to support the findings of the jury on the issues of negligence and as to the cause of death. In discussing the evidence bearing upon these issues, we shall take up first that which bears upon the cause of death. There are two phases of this inquiry, one relating to the acts of the defendant in administering the anaesthetic, the other to the symptoms exhibited by the patient indicating the cause of death. We have stated the theory of the plaintiffs. The defendant's theory was that death resulted from heart failure and surgical shock unrelated to the anaesthesia. The jury found that the anaesthetic was administered in a manner which resulted in death, that is to say, gas was administered with an insufficient admixture of oxygen. The defendant testified that during the interval between the disconnection of one tank and the connection of the other he kept his fin-

gers under the edges of the mask so as to allow the patient to breathe oxygen from the air, and that at no time was gas administered without oxygen.

A Miss Tudor, surgical nurse, testified for plaintiffs that the mask was kept on the patient's face for approximately five minutes during the change of tanks, being lifted only once during that time. Mrs. Hotaling, a lay witness for plaintiffs, testified to the same effect, stating that the mask was raised but once for an instant while defendant looked at the patient's eyes and that the witness did not see that the doctor kept his fingers under the edges of the mask. The evidence was ample to show that the administration of gas without oxygen for such a period of time would probably result in death.

[1] Dr. Trenery, an osteopathic physician, and the only medical expert produced by plaintiffs, testifying in answer to a hypothetical question, gave it as his opinion that death resulted from asphyxiation. Unless his testimony is subject to such inaccuracies and defects as to rob it of probative force, the opinion expressed by this witness is evidence tending to prove that the anaesthetic was administered in a lethal mixture. We have reached the conclusion that the opinion expressed by this witness was based upon a palpably deficient and false hypothesis and carries no weight whatever as opinion evidence as to the cause of death. The symptoms of an overdose of ethylene gas are cyanosis or a bluish color of the body before death, labored, rapid, and shallow breathing and a drop in blood pressure following cessation of respiration. These are the symptoms stated by Dr. Trenery and the other physicians who gave testimony on the subject. Dr. Rinkenberger was of the opinion that in asphyxiation cessation of respiration would not precede a drop in blood pressure. All of the medical witnesses testified that a drop in blood pressure prior to cessation of respiration would indicate heart failure. This was the opinion of Dr. Trenery and the significance of this fact will be discussed later. The symptoms preceding the death of Mrs. Forbis were cyanosis following cessation of respiration, normal breathing up to the time of cessation of respiration, and a drop in the systolic blood pressure of the patient immediately preceding death from 135 to 105.

The hypothetical question propounded to Dr. Trenery assumed that the blood pres-

sure readings were not unusual during normal anaesthesia; it omitted altogether the last one, which showed a marked drop five minutes before cessation of respiration. In this respect the question assumed normal blood pressure during anaesthesia. The question also did not assume normal respiration up to the time of cessation of respiration. Both of these facts were highly significant as indicating the cause of death. We think they were so regarded by the witness, for he testified that a drop in blood pressure before cessation of respiration would be an important fact to be taken into consideration. He stated, "It is my opinion that in death by suffocation respiration would cease and the blood pressure would drop following, whereas in death from heart failure the blood pressure would drop before respiration ceased"; also, that it would be a marked drop and that he believed there would be a drop to a lesser extent in death by suffocation. He did not testify that in suffocation there would be a drop in blood pressure before respiration ceased, but he did testify that in death by suffocation there might be a slight rise in blood pressure before the drop, but in that case he could not tell at what time the blood pressure would drop. We quote from the testimony of this witness to show that while he failed to take into consideration the marked drop in blood pressure, a symptom of heart failure, he very clearly considered it to be an important one in determining the cause of death. It is difficult to believe that this fact would have been studiously omitted from the question asked him and would have been given no consideration by the witness if the fact itself was consistent with his opinion that death was due to suffocation. He did not testify that he assumed the breathing of the patient to have been normal, but he did testify that one of the symptoms of an overdose of ethylene was rather deep breathing, which becomes shallow and rapid and ceases and that the breathing is not normal. He testified as follows on cross-examination: "Assuming that the patient's breathing was normal up to the time of death, I would not say that she was killed by a lethal dose of ethylene if that was the only fact known." In this instance again there was omitted from the hypothetical question a most material fact. The question did not assume that the patient's breathing was not normal, but in all fairness it should have assumed that it was normal, for such was the testimony.

We might add here that the testimony of plaintiffs' witness Mrs. Hotaling, relied upon by them, did not show abnormal breathing but quite the contrary. Again, Dr. Trenery testified that the symptoms of an overdose of ethylene were, among others, "cyanosis usually at first." He further testified in his cross-examination that he assumed the patient to have been cyanotic both before and after respiration ceased. There was no testimony to the effect that cyanosis occurred before cessation of respiration. No witness testified to an unnatural color of the patient's face prior to the time life became extinct. The opinion of Dr. Trenery was based in part upon the assumption that cyanosis occurred before respiration ceased, upon the further assumption that blood pressure did not drop before respiration ceased, and upon the further assumption that breathing was not normal. It is true that the witness does not admit assuming normal blood pressure and abnormal breathing, but he either so assumed or ignored those pregnant facts altogether. In either case the opinion as to the cause of death is worthless. There remains then nothing in the proven symptoms indicating the cause of death which support the opinion of this witness, unless it be the fact of cyanosis after death and a swelling of the neck. Cyanosis after death occurs in all cases, according to the medical testimony, except where there has been excessive hemorrhage. There was no testimony to the effect that swelling of the neck after death does not occur in death from heart failure or that it is peculiar to death from suffocation or an overdose of gas. In treating as a significant fact the swelling of the neck, the witness assumed this condition to have existed immediately after death, whereas the first observation testified to was made some three or four hours later.

[2] No one can doubt the extreme difficulty encountered by a jury or trial judge in an endeavor to determine the true cause of death in a case such as this. They are entitled to receive the honest opinions of expert witnesses, predicated upon facts established by the evidence, and the opinions are of no value if they are based upon essential facts which are not given in evidence, upon facts which are directly contrary to the evidence, or upon statements omitting facts which are important, if not necessary, for the witnesses to take into consideration in formulating their opinions. Intentional unfairness need not exist to jus-

tify the rejection of such evidence. The result is the same if the fault lies in honest mistake or in an excess of zeal to achieve the desired result. The questions asked may be unfair and the answers may be unfair, if based on a wrong hypothesis, notwithstanding the good intentions of counsel and witness.

The foregoing considerations condemn the testimony of the witness Trenery and brand it as of the type of opinion evidence unworthy of credence and unacceptable as evidence. The hypothetical case as to which his opinions were given was not that of Mrs. Forbis.

[3-5] We give full recognition to the rule that a very considerable latitude is allowed in the statement of hypothetical facts calling for opinions from expert witnesses. Such statement need not include all of the facts testified to and, of course, it may assume facts most favorable to the theory of the party for whom the witness is testifying. There may be an allowable variation between the facts assumed and the actual facts proven. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25. But it is said in this case that the opinion can have little, if any, value unless the material facts assumed in such question are substantially true.

[6,7] Where the material facts upon which the opinion is based are untrue, and the erroneous hypothesis is disclosed by the questions, or by the answers of the witness, or by his testimony on cross-examination, the opinion itself becomes false and misleading. It tends to obscure the truth and to lead juries or courts into erroneous conclusions of fact. Opinion evidence lacking a true foundation of fact is incompetent. It carries no weight in the trial of a case and carries none when considered on appeal. A finding based wholly upon such incompetent evidence is without support. *In re Gould's Estate*, 188 Cal. 352, 205 P. 457; *Johnson v. Clarke*, 98 Cal. App. 358, 276 P. 1052.

[8] In submitting to juries questions calling for scientific and technical elucidation, where the chances of an erroneous result are always prevalent, the greatest care should be exercised to guard against opinion evidence which is fallacious and misleading. The relaxation of this rule in the instant case was especially unfortunate, in view of the difficult and delicate questions of fact involved.

[9] Timely and sufficient objections were made by defendant to the question which called for the opinion of Dr. Trenery as to the cause of death. The objections could have been made more specific had there been incorporated in the question facts erroneously assumed by the witness as developed on his cross-examination, but the objections, as made, should have been sustained. The testimony of this witness was therefore improperly before the jury. The injurious consequences are manifest. The opinion of the doctor, if believed, established suffocation as the cause of death and made it necessary for the jury to believe that the mask was held upon the face of the patient as testified to by plaintiffs' witnesses, and not as testified to by the defendant. But for the opinion of the doctor, a contrary conclusion might well have been reached. That the defendant's case was prejudiced admits of no doubt, and upon this ground the judgment must be reversed. A discussion of the error in the admission of Dr. Trenery's testimony and of the effect thereof would be incomplete if we did not advert to the fact that all of the witnesses, who were observers, testified that respiration ceased almost simultaneously with the call for fresh oxygen. It would therefore appear, as a necessary sequence upon the record before us, that the assumption that the patient breathed an appreciable quantity, or perhaps any quantity of gas without oxygen, was based upon the merest speculation and conjecture. This fact leads us to believe that great credence was given the opinion evidence of Dr. Trenery and that this may have been a deciding factor in the case.

[10] The fact that blood pressure dropped just before respiration ceased was testified to by Rinkenberger, the operating surgeon; it was shown upon the chart, which was admitted in evidence, and no attempt was made to disprove it. Dr. Trenery was asked on cross-examination whether his opinion as to the cause of death would be the same if he assumed the drop in blood pressure to be a fact. He answered that his opinion would be the same. Upon redirect examination he was asked by plaintiffs' counsel to explain his reasons for the answer, which it appears he desired to do. He gave as his reason that Dr. Rinkenberger had no opportunity to observe the drop in blood pressure. A motion was made by defendant's counsel to strike out the answer, as a conclusion of the witness,

which was denied. This ruling was erroneous. Not only did the witness evade giving a direct and fair answer to the original question, but in explaining it he was allowed to cast doubt and suspicion upon the testimony of Dr. Rinkenberger, in a most unwarranted and uncalled for manner. The observation of the court to the effect that the answer "might be good and it might not be good," while evidencing a judicial impartiality, did not clarify the situation or rectify the damage.

[11] It would have been better had the court sustained defendant's objections to questions asked defendant's experts on cross-examination, in which it was assumed that the mask was held "tightly" on the patient's face. The evidence did not justify the question in that form and counsel should have been required to reframe it.

We are of the opinion that had it not been for the errors already discussed, a different result would probably have been reached by the jury. These views render it unnecessary to pass upon alleged errors in the refusal of instructions requested by defendant, and minor claimed errors in connection with the receipt of the testimony of plaintiffs' expert witness.

The judgment is reversed.

I concur: YORK, J.

I dissent: HOUSER, Acting P. J.



6 Cal.App.2d 515

GREENFIELD v. BOARD OF CITY PLANNING COM'RS OF LOS ANGELES

et al.

Civ. 9425.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Municipal corporations ☞600

Where zoning ordinance permitted carrying on of general contracting business as usually conducted and with usual accessories in connection with buildings and uses, general contractor held entitled to store on premises machinery, equipment, tools, and acces-

sories regularly used in conduct of his business.

2. Appeal and error ☞1073(1)

Where because of misconstruction of zoning ordinance city officials had forbidden lawful use of premises by general contractor and had threatened him with arrest if he should not discontinue such use, declaratory judgment adjudicating contractor's right to use premises would not be disturbed merely because defendants were enjoined from attempting to prevent contractor from operating his business on the premises, since declaratory judgment would be equally effective without the injunction (Code Civ. Proc. § 1060).

3. Action ☞6

Action for declaratory relief would lie where right of general contractor to conduct business on premises depended upon construction of zoning ordinance, and such right had been erroneously denied by city officials who were threatening contractor's arrest (Code Civ. Proc. § 1060).

4. Injunction ☞77(1)

City officials' admission that they intended to prevent use of premises by general contractor for conduct of his business held to show "irreparable injury" justifying injunctive relief where such use was lawful.

[Ed. Note.—For other definitions of "Irreparable Injury," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Fred F. Greenfield against Board of City Planning Commissioners of the City of Los Angeles and others for declaratory relief and an injunction. From a judgment for plaintiff, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones and D. M. Kitzmiller, Deputy City Attys., all of Los Angeles, for appellants.

Arthur C. Fisher, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for declaratory relief and an injunction. The plaintiff is engaged in the general contracting business. The real property on which he conducts said business is located in zone C

under the general zoning ordinance of the city of Los Angeles, and defendants concede in their briefs that it is proper to use the property for such business. On the front part of his lot is an office building. It was built for plaintiff's use in the general contracting business, and it is so used. On the rear of the lot is a garage building which is used by plaintiff in his said business. Along the sides of the lot, between the front office building and the garage building extend plaster covered fences eight feet high. Plaintiff stores the machinery and equipment used in his said business on the rear of the lot and in the garage building when not in actual use in his said business. It was because plaintiff was so storing his machinery and equipment on the premises when not in actual use that defendants notified plaintiff that he was violating the zoning ordinance in carrying on his said business on said premises. They ordered him to desist, and threatened to have him arrested if he did not so desist. This action was brought under section 1060 of the Code of Civil Procedure for declaratory relief. After issue was joined and trial had, the court found that the operation and conduct of said business as aforesaid on said premises was not prohibited by the said zoning ordinance or amendments thereto or any zoning ordinance of said city. Judgment was entered accordingly. The judgment also enjoined defendants from attempting to prevent plaintiff from operating a general contracting business on his said premises.

[1] Defendants construe the ordinance as prohibiting any storage on zone C property, even the storage of the machinery, equipment, tools, and accessories regularly used by plaintiff in the conduct of his said business. We cannot uphold such a harsh and narrow construction. The use of zone C property for storage is not expressly permitted by the zoning ordinance, but practically all of the forty or more different kinds of business which are expressly permitted by the ordinance require storage as a necessary incident thereof. In enumerating these businesses, the ordinance adds the words, "as ordinarily conducted." The ordinance also recites in regard to zone C property, "There may be the usual accessories in connection with such buildings, structures and/or uses." It is not claimed that the machinery and equipment stored on the premises are not regularly used in plaintiff's business, or that they are not the

usual accessories in his business, or even that they are not necessary to his business, nor is it claimed that his business is not "ordinarily conducted." To hold that the plaintiff cannot store on his property the accessories necessary or usual to his business would be as unreasonable as to say that retail and wholesale houses cannot store on their premises the goods, wares, and merchandise which is their stock in trade or the equipment, machinery, and accessories ordinarily used in handling the same.

Defendants call attention to the fact that the use of property for storage purposes is expressly permitted by the ordinance on property in zone D. An examination of the ordinance shows that as regards zone D property, "storage" may be in itself the sole or major purpose or business for which the property may be used. It is clear to us that storage, not as a business in itself, but as an incident of one of the permitted businesses "as ordinarily conducted" is not prohibited by the ordinance on zone C property.

[2] Defendants contend that an injunction suit will not lie to prevent city officials from enforcing a valid penal ordinance. The court did not enjoin the defendants from enforcing the ordinance. It went no further than to enjoin the defendants from attempting to prevent plaintiff from operating a general contracting business on his said premises. This the defendants concede the plaintiff has a right to do. The judgment would be equally effective with or without the injunction and we will not disturb it.

[3] Defendants insist that an action for declaratory relief will not lie "where other adequate relief may be obtained by the parties and where the only dispute between the parties is a dispute as to the existence of facts and no question is involved as to the construction or validity of any written instrument, deed, will or contract." Defendants do not indicate where other adequate relief may be obtained. Almost the sole question involved in this action is the construction of a written instrument, to-wit, the city ordinance discussed and construed hereinabove.

[4] The final contention of defendants is that city officials cannot be enjoined "from enforcing an ordinance where there is no showing that any of the threatened acts of the city officials would cause re-

spondent irreparable or any injury or damage." There does not seem to be any evidence in this regard, but a careful reading of the record discloses that the answers in the case filed by the defendants contain the following admission, to wit: "Defendants threatened to so act as aforementioned, to attack the right of the plaintiff in respect to the conduct of his business as of general contracting at said premises, in such manner as to prevent plaintiff from carrying on or continuing his business as aforesaid." This is a sufficient showing. The destruction of one's business is manifestly an irreparable injury.

From the foregoing, it is evident that we think the judgment should be, and it is, affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 534

SHEA et al. v. CITY OF LOS ANGELES.

Clv. 10024.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Municipal corporations ☞360(1)

If municipal corporation by its own act causes work to be done by contractor to be more expensive than it otherwise would have been according to terms of original contract, it is liable for increased cost.

2. Municipal corporations ☞360(2)

City held liable for increased expense caused to contractor engaged in constructing storm drain by leakage from sanitary sewer parallel to portion of drain, which was due to defects therein, and by filling in on certain streets done pursuant to city's permission, which necessitated excavation and tunneling in addition to that called for when bid was submitted, notwithstanding improvement act requiring contractors to inform themselves as to conditions and bear burdens incidental to overcoming obstacles which might appear (St. 1911, p. 730, as amended).

Action by Gilbert J. Shea and another, doing business under the fictitious firm name and style of the J. F. Shea Company, against the City of Los Angeles. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Ray L. Chesebro, Frederick Von Schrader, and D. M. Kitzmiller, all of Los Angeles, for appellant.

Lewis E. Whitehead, of Los Angeles, and Leslie K. Floyd, of Modesto, for respondents.

SCOTT, Justice pro tem.

Plaintiffs recovered judgment against defendant for work done in connection with construction of a storm drain, and defendant appeals.

The plans for the storm drain showed a sanitary sewer below and parallel to a portion of the storm drain. While excavating this portion, plaintiffs discovered leakage from the sewer due to defects in it and too great pressure, so that the trench was flooded and the sides caved in. Complaint was made to the board of public works of defendant city and with their approval and under their direction plaintiff pumped out the water and went ahead with his work. One cause of action in this case was for damages based on the foregoing facts.

The plans also showed that some filling in was "in progress" or "contemplated" on a portion of the ground which was below the level to be attained on completion, but just how much and when it was to be filled in could not be ascertained by plaintiffs before they made their bid. After the bid was in, certain filling in was done on certain streets under the control of defendant pursuant to the permission given by defendant. This necessitated excavation and tunneling in addition to that called for at the time the bid was submitted and the expense thereof constituted further causes of action by plaintiffs.

[1,2] The contract was entered into and the work was done under the "Improvement Act of 1911" (St. 1911, p. 730), as amended. The contract contained language which reasonably may be construed as requiring plaintiffs to inform themselves as to conditions and to bear the burdens incidental to overcoming the obstacles which might appear and were in part as follows: "Sec. 2. Examination of Ground. Bidders must examine and judge for themselves as to the lo-

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

cation and surrounding of the proposed work, the nature of the excavation to be made, and the work to be done. The plans, profiles and other drawings for the work will show conditions as they are supposed or believed by the City Engineer to exist, but it is not intended or to be inferred that the conditions as shown thereon constitute a representation by the City, or its officers, that such conditions are actually existent, nor shall the City or any of its officers be liable for any loss sustained by the contractor as a result of any variance between conditions as shown on the plans and the actual conditions revealed during progress of the work or otherwise." "Sec. 15. Loss or Damage. All loss or damage arising from any unforeseen obstruction or difficulties, either natural or artificial, which may be encountered in the prosecution of the work, or from any action of the elements prior to the final acceptance of the work, or from any act or omission not authorized by these specifications on the part of the contractor, or any agent or person employed by him, shall be sustained by the Contractor." "Sec. 102. Extent of Excavation. The contractor shall make sufficient excavation to construct all work shown on the plans. Excavation shall include the removal of all water and all materials or obstructions of any nature that would interfere with the execution of the work. The bottom of excavation shall be free from all loose material at the time concrete is deposited. * * *

It is apparent, however, that the contract did not contemplate that plaintiffs should bear the burden of the city's negligence in doing or permitting acts which would constitute an obstacle to plaintiffs in fulfilling the obligations imposed by the contract. While the city may have had a right to negligently maintain its sewers and to fill in its streets before the contract was made, it abridged that right when it entered into the contractual relation with plaintiffs. When the contract in question was executed by defendant and plaintiffs, the law imposed on defendant city a new obligation, to wit, that of maintaining its sewers and filling in its streets in such a manner that it would not impede plaintiffs in carrying out the task of constructing the storm drain. If that duty was violated, the plaintiffs were entitled to damages to compensate them for the detriment thus caused. As Mr. Justice Cardozo stated in the case of *Sundstrom v. State*, 213 N. Y. 68, 106 N. E. 924, 925, decided by the Court of Appeals of New York, in consider-

ing detriment to the contractor engaged to build a canal, by reason of leaks in a nearby old canal: "Undoubtedly the claimants assumed the risk of any unforeseen conditions not due to the fault of the state, but, in the absence of actual notice, we do not think they assumed the risk of unforeseen conditions due to the negligent omission of the state to repair and safeguard its own structures. * * * We think, however, that even toward contractors the state is under a duty to use reasonable care in maintaining its own property in safety, and that for failure to fulfill that duty it is answerable in damages. A contractor undertaking work of excavation near a sewer in a city street would have to bear the extra cost due to the proximity of the obstruction; but, unless by special contract, he would not assume the risk of the city's flooding his work because of a negligent omission to keep its sewer in repair. * * * In these circumstances, we must apply against the state the principle applied against a municipal corporation in *Horgan v. Mayor, etc., of New York*, 160 N. Y. 516, 55 N. E. 204. The ruling there was that, if such a corporation by its own act causes work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable for the increased cost." In considering terms in the contract there in question comparable to those set forth in this case, the court held that the contractors "were under no duty to be on their watch in order to discover whether the state had been negligent in the discharge of its own duties. * * * If they did not have knowledge, it is not sufficient that they could by diligent effort have acquired it."

It appears in this case that plaintiffs had no knowledge of the defects complained of until the damage started to occur.

The Appellate Division of the New York Supreme Court has considered many of the problems here presented. In *Ryder Bldg. Co. v. City of Albany*, 187 App. Div. 868, 176 N. Y. S. 456, 458, it said: "In every express contract for the erection of a building or for the performance of other constructive work, there is an implied term that the owner, or other person for whom the work is contracted to be done, will not obstruct, hinder, or delay the contractor, but, on the contrary, will in all ways facilitate the performance of the work to be done by him," and held that in case of such breach the party "became liable for damages, measured by

the extra expense incurred." In *Thilemann v. City of New York*, 82 App. Div. 136, 81 N. Y. S. 773, at page 777, the court stated: "By its own act in permitting the other contractors to proceed with grading and regulating the very streets and avenues in which the plaintiff was directed to construct his sewer in accordance with the condition of the locality as it originally was, the city increased the plaintiff's work, and for the additional cost it should respond in damages."

In considering the situation of a contractor who encountered defective sewers, the court in *Pilkington Co. v. City of New York*, 211 App. Div. 558, 207 N. Y. S. 118, reaffirmed the rule declared in *Sundstrom v. State*, *supra*.

No question is raised on this appeal as to the reasonableness of the amount of damages awarded.

Judgment affirmed.

We concur: CRAIL, J.; STEPHENS, P. J.



6 Cal.App.2d 539

**THOMAS KELLY & SONS, Inc., v. CITY
OF LOS ANGELES.**
Civ. 9182.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Bridges ⇨20(4)

Under contract for municipal bridge, which was to rest on concrete piers resting on pilings, which contract provided that no information derived from plans or specifications would relieve contractor from any risk or from properly fulfilling terms of contract and that excavation should include removal of all materials or obstructions of whatever nature encountered, contractor *held* not entitled to recover additional amount for increased expense because of unexpected rock formation in river.

2. Bridges ⇨20(4)

Municipal bridge contractor *held* not entitled to recover additional amount for increased cost resulting from unexpected rock formation on ground of implied representation contained in plans and specifications providing for driving of pilings that ground

was soft and sandy, where true character of river bed and rock formation was discovered as soon as contractor started work and contractor elected to proceed and retain benefits accruing under contract (Civ. Code, §§ 1589, 3521).

3. Bridges ⇨20(4)

Municipal bridge contractor would not be entitled to recover for increased expense due to unexpected rock formation in river on theory of quantum meruit or estoppel unless work done was within contract.

4. Municipal corporations ⇨226

Mode of contracting as prescribed by municipal charter is measure of city's power to contract, and contract made in disregard of prescribed mode is unenforceable.

5. Bridges ⇨20(3)

Municipal bridge contractor *held* not entitled to recover for increased expense due to unexpected rock formation in river on ground of ratification of promises of inspector of public works and city engineer to pay additional compensation, in view of charter provision requiring vote of city council to authorize contract (St. 1911, pp. 2145, 2146, §§ 207, 207a, superseded by St. 1925, p. 1142, §§ 385, 386).

6. Bridges ⇨20(4)

Under municipal bridge contract providing for allowance for extra work, contractor *held* not entitled to recover for increased expense due to unexpected rock formation in river, since expense was not caused by "extra work," but by extra difficulty in doing work called for by contract.

[Ed. Note.—For other definitions of "Extra Work," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Thomas Kelly & Sons, Inc., against the City of Los Angeles. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

Ray L. Chesebro, Frederick Von Schrader, Grant B. Cooper and D. M. Kitzmiller, all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, Albert Parker, and Karl B. Rodi, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment for work done in connection with construction of a bridge across Los Angeles river on Los Feliz boulevard. Defendant appeals.

A contract had been entered into between the parties in October, 1924, pursuant to a bid submitted by plaintiff. The plans and specifications showed that the bridge was to rest upon concrete piers which in turn were to rest upon pilings. When excavation was started, a rock formation was encountered in the river bottom, but plaintiff went ahead and completed the bridge. Defendant paid plaintiff the sum of \$11,670.52 in addition to the total value of the regular contract as completed, which was in the sum of \$135,099.73. Plaintiff then brought this suit to recover a further amount which it is claimed was still due by reason of the extra work involved because of the said rock formation, and was awarded judgment for \$11,835.94.

In response to issues raised by an amended complaint the trial court found "that in and by said plans and specifications said bridge is shown as resting upon concrete piers which in turn rest upon pilings, twenty feet in length and of the number and location shown on said plans. That said plans imported to the plaintiff and to any and all bidders that said concrete piers were to be constructed on pilings because the soil underneath said bridge was of sand or other soft unstable substance which would not support the piers, and that said plans further imported that the soil underneath the piers to be erected for said bridge was of sand, mud, silt or other unstable substances. That plaintiff caused the site of said bridge to be examined before making its bid but that such examination gave no indication of the existence of shale and rock thereunder." It further found that plaintiff put in a lower bid in reliance on the plans, "that said plans constituted a representation that the soil to be excavated was of sand, mud, silt or other soft and unstable substances, and that this representation was not true in fact"; that plaintiff did encounter the rock and shale which was more expensive to remove; that by reason of the representation in the plans and its reliance thereon plaintiff had made no allowance for the removal of such harder substances; that the consideration which defendant had agreed to pay did not comprehend or contemplate any compensation for such excavation through rock and shale; and that plaintiff went ahead relying on written and oral approval of one Rook, inspector of public works (who approved the additional sum already paid), and of the city engineer, who approved a somewhat higher figure for the extra work.

Reference is made to a term of the contract providing that "extra work will be paid for at actual necessary cost, as determined by the engineer, whose determination shall be final, plus 15 per cent, for the rent of the contractor's plant, profit, superintendence and general expense." Among the "general provisions" which were part of the contract were the following: "Sec. 6. No information derived from the map, plans, specifications, profiles or drawings or from the engineer or his assistants will in any way relieve the contractor from any risk, or from properly fulfilling all the terms of the contract. * * * Sec. 37. Excavation and Backfill: The contractor shall make sufficient excavations to permit footings, piers, walls and abutments to be constructed in accordance with the plans and specifications. Such excavations shall include the removal of all water and other materials or obstructions of whatever nature encountered." Among "Instructions to Bidders" it was provided: "Personal Examination: Bidders are requested to carefully examine the plans and read the specifications, and are required to personally satisfy themselves as to all local conditions affecting the work. The accuracy of the interpretation of facts disclosed by borings or other preliminary investigations is not guaranteed." In the "Proposal" the bidder is required to state that he has examined and knows conditions where the work is to be done.

The president of plaintiff corporation testified that he had gone out to the site of the new bridge, had seen sand on the surface of the ground, and had observed the old bridge, which was on pilings and was next to the line of the new one. No subsurface exploration or boring of any kind was done by either party, although from the evidence it appears it could have been done at a cost of about \$20 and that true conditions would have been thus revealed.

[1] Under the clear terms of the contract plaintiff was not entitled to an added sum because of difficulties it encountered in carrying out its agreement. By no reasonable construction could it be said that the provision for payment of cost plus 15 per cent. for "extra work" was intended to provide payment of such added charge to compensate the contractor for obstacles overcome in fulfilling his contract. To warrant such elasticity in construing this provision, we should be required to hold that it intended to say, "If the city has included in the plans and specifications anything that has

misled you, notwithstanding its warning not to rely on them but to satisfy yourself as to conditions, and you are put to added expense in doing what you have agreed to do, this extra expense may be called 'extra work' and our subordinate officials are authorized without any further action on our part to bind us to pay as much as they see fit by way of such extra cost, to which will be added 15 per cent for rental and profits."

[2] The theory is advanced, as above indicated, that defendant had made implied untrue representations, and in reliance upon them plaintiff had entered into the contract. The warning to plaintiff in making his bid as above quoted was ignored, and the "general provisions" of the contract remained unheeded. Yet it is asserted that plaintiff entered into this contract involving in excess of \$135,000 in reliance upon an implied representation contained in the plans and specifications to the effect that since they provided for driving of piles the ground must be soft and sandy. The true character of the river bed and the rock and shale formation due to proximity to hills was discovered as soon as plaintiff started work. At the very outset, therefore, the falsity of these so-called implied representations was discovered. Plaintiff did not ask to be relieved of its contract and no new contract was entered into between the contracting parties. Plaintiff chose to retain the beneficial values to accrue under the contract into which it had thus been led. It elected to deal with a subordinate official not authorized to contract for defendant, and was content to accept his assurance that it would be paid extra because of the trouble encountered in excavating; and plaintiff has in fact been paid all of the additional compensation which that very official said it was entitled to receive. The propriety of such payment, already made, is not before us, and we herein make no intimation thereon. Having elected to proceed under the contract into which it had entered and to retain the benefits thereunder to accrue, plaintiff cannot refuse to accept the duty imposed by its terms and now seek extra pay for doing just what it had agreed to do. The generous declaration of the city engineer, who was not authorized to contract for the city, to the effect that because of hardship encountered plaintiff should be paid more than the contract provided, could not be construed as binding upon the city. It is a maxim of jurisprudence that "he who takes the benefit must

bear the burden" (Civ. Code, § 3521), and that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting" it (Civ. Code, § 1589).

[3] No suggestion is advanced that any new or additional contract was entered into between the parties conforming to the requirements of the charter of defendant city. No theory of quantum meruit or estoppel can avail the contractor unless the work done was within the contemplation of the one contract between the parties. *Nash v. City of Los Angeles*, 78 Cal. App. 516, 248 P. 689; *Gamewell Fire Alarm Tel. Co. v. City of Los Angeles*, 45 Cal. App. 149, 187 P. 163; *Strauch v. San Mateo Jr. College District*, 104 Cal. App. 462, 286 P. 173.

In considering a case where the nature of the soil encountered by a contractor in building a drydock was different from that anticipated, the Supreme Court of the United States held that additional compensation should not be allowed, and stated: "The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract, or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement." *Simpson v. United States*, 172 U. S. 372, 19 S. Ct. 222, 224, 43 L. Ed. 482.

[4, 5] Sections 207 and 207a of the charter of the city of Los Angeles were in effect when the plans and specifications were adopted and the contract was let in 1924. (St. 1911, pp. 2145, 2146.) They were superseded by sections 385 and 386 of the new charter of said city, adopted in January, 1925. (St. 1925, p. 1142.) Those sections required a vote of the city council to authorize, in a case such as this, the advertising, bids, and awarding of the contract. "Contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in quasi contract can be had for work performed under them. It is also settled that the mode of contract-

ing as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable." *Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348, 352, 291 P. 839, 842, 71 A. L. R. 161. The case just cited quotes with approval the case of *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, which holds that a purported ratification is not valid unless it has followed the procedure required for the execution of a contract in the first instance.

[6] Since the defendant city in this case cannot be held liable for the additional compensation on the theory of an express or implied contract, nor of ratification, estoppel, or quantum meruit, and since plaintiff could not recover on the theory that the difficulties encountered constituted "extra work" within the meaning of that term as used in the contract, so as to justify recovery on that ground—for it appears as a matter of fact from undisputed evidence that it was not extra work but merely extra difficulty in doing the work called for by the contract—we are wholly unable to agree with the conclusion of the trial court awarding judgment to plaintiff.

We distinguish from the instant case certain cases decided by the Supreme Court of the United States which would appear from language used to support respondent's contentions, including *Hollerbach v. United States*, 233 U. S. 165, 34 S. Ct. 553, 58 L. Ed. 898; *Christie v. United States*, 237 U. S. 234, 35 S. Ct. 565, 59 L. Ed. 933; *United States v. Atlantic Dredging Co.*, 253 U. S. 1, 40 S. Ct. 423, 64 L. Ed. 735. See, also, *United States v. Spearin*, 248 U. S. 132, 39 S. Ct. 59, 63 L. Ed. 166. In none of these cases was the government limited by charter provisions such as those which restrain defendant city in this case, and it affirmatively appears that some affirmative representation or improper concealment misled the contractor to his detriment.

It will be observed that the case of *Shea v. City of Los Angeles*, 6 Cal. App. (2d) 534, 45 P.(2d) 221, this day decided by us, presents a legal principle which is not at variance with the views herein expressed.

Judgment reversed with directions to enter judgment for defendant.

We concur: CRAIL, J.; STEPHENS, P. J.

TAYLOR v. HAWLEY et al.

Civ. 5338.

District Court of Appeal, Third District,
California.

May 3, 1935.

Rehearing Denied June 1, 1935.

Hearing Denied by Supreme Court
July 1, 1935.

1. Jury ⇨14(9)

In suit to quiet title to realty, possession of which was conceded to be in plaintiff, defendants, who in cross-complaint set up affirmative equitable defenses, including fraud and inadequate consideration, held not entitled to trial by jury.

2. Jury ⇨25(2)

Defendants in quiet title action waived their claim of right to trial by jury by failing to demand jury (Code Civ. Proc. § 631).

3. Jury ⇨31(1)

Defendants in quiet title action could not claim that they were deprived of trial by jury because of injunction restraining defendants from prosecuting suit previously commenced by defendants, where pendency of former suit was not set up as bar to quiet title action, and defendants had opportunity of pleading all affirmative matter which appeared in former suit (Code Civ. Proc. § 631).

4. Quieting title ⇨50

Injunction held properly issued in quiet title action to restrain defendants from interfering with plaintiff's title and from prosecuting suit against plaintiff, since injunctive relief in quiet title action is inherent remedy to terminate expensive and troublesome interference with ownership and right of possession of property by one who has been regularly determined by court of equity to be entitled thereto (Code Civ. Proc. § 526, subd. 6).

5. Appeal and error ⇨907(4)

Mortgagors could not complain that notice of sale of property under trust deed was not duly posted for time required and in conspicuous place on property, where settled bill of exceptions, which did not purport to recite all of evidence recited testimony of posting of notice of trustee's sale, on premises, and appellate court would assume that evidence adequately showed that notice was posted in conspicuous place.

6. Appeal and error ⇨907(4)

Every intentment is in favor of findings, decision, and judgment of trial court, and, in absence of complete record of testimony adduced at trial, it will be presumed that omitted evidence amply supports determination of trial court.

7. Appeal and error ⇐1010(1)

Mortgagors could not complain of trial court's finding, that amount for which property under deed of trust was sold was adequate, as not being supported by evidence, where bill of exceptions showed testimony to effect that amount for which property was sold to mortgagee was an adequate price.

8. Appeal and error ⇐882(3)

In action by mortgagee's transferee to quiet title to premises purchased by mortgagee at foreclosure sale, mortgagors could not claim that deed was not delivered, where mortgagors in cross-complaint alleged that trustee under deed of trust caused property to be sold and pursuant to sale issued trustee's deed to mortgagee as purchaser, and record disclosed that trust deed was recorded.

9. Appeal and error ⇐1010(1)

In action by mortgagee's transferee to quiet title to premises purchased by mortgagee at foreclosure sale, mortgagors could not complain because purchase price was not credited upon notes which represented mortgagors' indebtedness, where trial court found that failure to credit amount of purchase price was mere oversight, and clerk of court was directed to credit purchase price upon notes.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by William J. Taylor, as executor of the estate of Jacob George, deceased, against Fred B. Hawley and his wife, wherein defendants filed a cross-complaint. From a judgment, defendants appeal.

Affirmed.

Lamb & Lamb, of Long Beach, for appellants.

Henry Grivi, of Los Angeles, amicus curiæ.

George F. Kapp, of Long Beach, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Since the commencement of this action the interest of the original plaintiffs in the property in litigation was transferred to Jacob George, who subsequently died. Upon proceedings duly had, William J. Taylor was appointed and qualified as executor of the estate of Jacob George, deceased. William J. Taylor, as such executor, has been substituted as plaintiff. This appeal will therefore be determined in the name of

William J. Taylor, as Executor of the Estate of Jacob George, Deceased, v. Fred B. Hawley, and Elsie J. Hawley, Husband and Wife.

The defendants have appealed from a judgment which was rendered against them in a suit to quiet title to a Long Beach lot. The appellants contend that the findings and judgment are not supported by the evidence, and that the court erred in refusing them a trial by jury.

The defendants were the owners of lot 17 of Anderson tract of the city of Long Beach. August 14, 1929, the defendants borrowed from the Golden State Bond & Mortgage Company, Limited, the sum of \$11,000, executing and delivering a trust deed upon the lot in question to secure the loan. Subsequently the defendants defaulted in payments of money secured by the terms of the trust deed. Upon giving notice therefor pursuant to the terms of the trust deed, the property was sold by the trustees to the Golden State Bond & Mortgage Company, Limited, for the sum of \$5,000, and the purchaser thereupon took possession of the property. Claiming that possession of the property had been obtained by the mortgage company by fraud, and that the mortgage sale of the property was void for lack of legal notice thereof, and for lack of adequate consideration, the defendants instituted suit and threatened to take forcible possession of the property from the purchaser thereof. Jeannie D. Carlin was appointed and qualified as receiver of the mortgage company, and this suit to quiet title to lot 17 of the Anderson tract of Long Beach was then commenced. The complaint also asks that the defendants be enjoined from forcibly ousting the plaintiff from possession of the property, as they had threatened to do, and from otherwise interfering with her lawful possession by the instituting of a multiplicity of annoying suits. The defendants filed an answer to the complaint, denying the material allegations thereof, and also filed a cross-complaint setting up as an affirmative defense to the suit to quiet title the alleged fraud, lack of notice of foreclosure sale, failure to deliver the deed of conveyance and inadequacy of consideration, rendering the sale void. The cause was tried by the court sitting without a jury. The court adopted findings favorable to the plaintiff on all the material issues. The court specifically found that the mortgage

sale of the property was legally made upon adequate notice therefor; that the plaintiff was not guilty of fraud with relation thereto; that the purchase price was adequate; that the deed of conveyance was duly delivered; and that the plaintiff is the owner and entitled to the possession of the property. A judgment was accordingly rendered quieting title to the lot in question in plaintiff and enjoining the defendants from interfering with plaintiff's peaceable possession thereof by maintaining litigation with relation thereto or otherwise. From that judgment, the defendants have appealed.

The appeal is brought to this court upon a bill of exceptions which does not purport to include all of the evidence which was adduced at the trial. The certificate of the trial judge settling the bill of exceptions reads as follows: "The foregoing bill of exceptions was prepared within the time allowed by law, and as extended by order of the court, and sets forth enough of the proceedings had during the trial of said cause and an abbreviated abstract of the evidence offered therein, and is this 5th day of April, 1933, settled and allowed as corrected."

[1-3] The appellants contend that they were entitled to a trial by jury. We think not. This is a suit to quiet title to real property, the possession of which was conceded to be in the plaintiff by virtue of a deed of conveyance. The cross-complaint sets up affirmative equitable defenses, including fraud, lack of adequate consideration and other alleged reasons for setting aside the deed to the property as void. This is therefore essentially a case in equity, in the trial of which the parties were not entitled to a jury. *Cobe v. Crane*, 173 Cal. 116, 159 P. 587; *Holland v. Kelly*, 177 Cal. 43, 169 P. 1000; *Rocha v. Rocha*, 197 Cal. 396, 240 P. 1010; 22 Cal. Jur. 178, § 50. Moreover, the defendants waived their claim of right to a trial by jury by failing to demand a jury when the case was set for trial, or at all. Section 631, Code Civ. Proc.; 15 Cal. Jur. 345, § 19. The record does not show that the defendants ever demanded a trial by jury in this action. It does appear that the defendants had previously commenced another suit involving similar issues, which case was still pending at the time of the trial of this action. The appellants contend they were deprived of a jury trial in that other action by the injunction which was issued in

this case restraining them from maintaining or prosecuting the former action or interfering with the plaintiff's title and right of possession. The pending of the former suit was not set up by the defendants in this case as it might have been alleged (22 Cal. Jur. 127, § 16) as a bar to this action. Moreover, the defendants had an opportunity of pleading in this case all of the affirmative matter which appeared in the former action so as to raise the same issues which were therein contained. In fact, we understand that all of the same issues which were presented in the former case were also included in the issues of this cause. The appellants were not entitled to a jury trial in this case.

[4] The court did not err in directing the issuing of an injunction in this case restraining the defendants from interfering with the plaintiff's title and right of possession by maintaining litigation or otherwise. *Wolf v. Gall*, 174 Cal. 140, 162 P. 115; 22 Cal. Jur. 133, § 20. Injunctive relief incident to a decree quieting title is an ancient remedy growing out of what has been termed the "bill of peace in a court of chancery." It is a proper inherent remedy to terminate expensive and troublesome interference with the ownership and right of possession of property by one who has been regularly determined by a court of equity to be entitled thereto. Our statute authorizes the issuing of an injunction "to prevent a multiplicity of judicial proceedings." Section 526, subd. 6, Code Civ. Proc.

[5,6] The appellants assert that the court's finding that the notice of sale of the property under the trust deed was duly posted pursuant to the terms thereof for the time required and in a "conspicuous place" on the property, is not supported by the evidence. We are of the opinion this point is not well taken. The settled bill of exceptions does recite that a witness testified "that the Notice of Trustee's sale was posted on the premises involved and where it was posted." In support of the finding of the court and the judgment, we may not assume that this notice was hidden away in some inconspicuous place. In support of the finding in question, we must assume that the evidence adequately shows that the notice was posted in a "conspicuous place" on the premises, particularly since the bill of exceptions does not purport to recite all of the evidence which was adduced at the trial. The certificate of the

trial judge which was attached to the bill of exceptions merely states that it "sets forth enough of the proceedings had during the trial of said cause and an abbreviated abstract of the evidence offered therein." Every intendment is in favor of the findings, decision, and judgment, and, in the absence of a complete record of the testimony adduced at the trial, it will be presumed the omitted evidence amply supports the determination of the court. *Coleman v. Farwell*, 206 Cal. 740, 276 P. 335; *In re Silva*, 213 Cal. 446, 2 P.(2d) 341; 2 Cal. Jur. 877, § 514.

[7] It is asserted that the finding of the court, "that the amount for which said property was sold, to-wit five thousand dollars (\$5,000.00) is not an inadequate consideration," is not supported by the evidence. There is no merit in this contention. The bill of exceptions shows that D. B. Carlin, president of the Golden State Bond & Mortgage Company, testified that "the said trustee sold the said property to the Golden State Bond & Mortgage Company for five thousand dollars (\$5,000.00) and that five thousand dollars (\$5,000.00) was an adequate price."

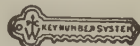
[8, 9] There is ample evidence of the delivery of the trustees' deed of conveyance of the property to the plaintiff. The asserted failure to deliver the deed was not an issue under the pleadings. The complaint alleges that the plaintiff is the owner and in possession of the property, and demands that the defendants "be required to set forth the nature of their claim and/or interest in and to said property." The cross-complaint of the defendants alleges: "That pursuant to said notice of sale, the * * * Trustee in said deed of trust caused the said property to be sold for the sum of Five Thousand Dollars (\$5,000.00), and pursuant to said sale issued a trustee's deed to the Golden State Bond & Mortgage Co. as purchaser at said sale." The trust deed appears in the record on appeal to have been duly recorded. The pleadings do not intimate a lack of delivery of the deed. The foregoing allegation of the cross-complaint clearly infers that the deed was delivered. The only allegation of the defendants with relation to the last-mentioned subject is that the purchase price of the property is inadequate and that it was not credited upon the promissory notes which represent the indebtedness of the defendants. But the court found in that

regard that the failure to credit the amount of the purchase price "was a mere oversight," and the clerk of the court was directed to credit the \$5,000 upon the notes of the defendants. The record adequately supports this finding.

We find no real merit in any of the contentions of the defendants on this appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 678

DENIO et al. v. BRENNECKE et al.

Civ. 1542.

District Court of Appeal, Fourth District,
California.

May 10, 1935.

Hearing Denied by Supreme Court
July 8, 1935.

1. Frauds, statute of ☞129(3)

That consideration for oral agreement to transfer percentage of oil rights was rendition of legal services *held* immaterial as respects issue whether action on agreement was barred by statute of frauds (Civ. Code, § 1624, subd. 4).

2. Frauds, statute of ☞63(1)

Agreement to give percentage of oil to be produced and saved from property in return for legal services rendered *held* agreement to assign or transfer interest in real property, and action thereon was barred by statute of frauds, where agreement was oral (Civ. Code, § 1624, subd. 4).

3. Frauds, statute of ☞149

In action on oral agreement to transfer oil to be produced from land in return for legal services, allegations that plaintiffs had fully performed their part in rendering services *held* not allegation of such part performance as to take agreement out of operation of statute of frauds (Civ. Code, § 1624, subd. 4).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by E. C. Denio and another against John Brennecke, Anna Brennecke, an incompetent, and others. From judgment for defendants following order sus-

taining demurrers to the complaint, without leave to amend, plaintiffs appeal.

Affirmed.

J. E. Light, S. G. Bay, and George M. Pierson, all of Los Angeles, for appellants.

Sarau & Thompson, of Riverside, and C. P. Temple, of Los Angeles, for respondents.

JENNINGS, Justice.

Plaintiffs appeal from a judgment rendered in favor of defendants following the entry of an order sustaining demurrers to the complaint without leave to amend.

The complaint contains three counts. In the first count a cause of action for an accounting is attempted to be pleaded. It is therein alleged that in the month of September, 1922, the defendants were the owners of certain real property in the county of Los Angeles; that in said month plaintiffs rendered legal services for defendants at their request, and that for said services which were fully performed by plaintiffs "the defendants verbally agreed to and with the plaintiffs, that they would give and yield to the plaintiffs from time to time as and when produced one per cent or one one-hundredth part of all the oil, gas and hydrocarbons produced and saved" from said real property; that on or before June 1, 1923, wells had been drilled on the land and oil, gas, and other hydrocarbons were produced therefrom, and such production has been continuous from said date; that during all of the time since said last-mentioned date the defendants received and detained all of the 1 per cent. of the oil and gas produced and sold the same for an amount of money unknown to plaintiffs; that prior to the institution of the action plaintiffs demanded that the defendants render an accounting of the oil and gas produced; and that they pay to plaintiffs 1 per cent. thereof, but the defendants refused and neglected to render an accounting or to pay the specified 1 per cent.

The second cause of action incorporates by reference those paragraphs of the first count, wherein it is alleged that the defendants verbally agreed to give plaintiffs 1 per cent. of the oil and gas which might be produced on the land, that wells were bored which resulted in the production of oil and gas, and that defendants received all of the proceeds derived from such oil and gas and refused to account to plaintiffs for the 1 per cent. thereof or to pay said 1 per

cent. It is then alleged that the defendants hold the oil and gas produced and the proceeds thereof "as bailees for the plaintiffs and in trust for these plaintiffs and have wrongfully held the same since the 9th day of September, 1932, and since these plaintiffs demanded the same from and of the defendants."

The third cause of action alleges that the defendants are indebted to plaintiffs for the money had and received from the sale of 1 per cent. of all the oil, gas, and other hydrocarbons produced and saved from the land, the amount of which is unknown to plaintiffs, and that defendants received "said proceeds from month to month and have retained and detained the same for the use and benefit of these plaintiffs."

The prayer of the complaint is that it be decreed, first, that plaintiffs are the owners of 1 per cent. of all gas and oil produced on the land since September 9, 1922, or which may hereafter be produced; second, that defendants be required to account for all the gas and oil produced and for the proceeds thereof; third, that plaintiffs have judgment for such amount as shall be found due upon such accounting.

Various grounds were specified in the demurrers which were interposed by the defendants. Only one of such grounds need here be considered, since it is our opinion that the demurrers were properly sustained on this ground and that the judgment in defendant's favor must therefore be affirmed. This ground is that the causes of action pleaded in the complaint are barred by the provisions of section 1624 of the Civil Code.

The above-mentioned section contains six subdivisions. We entertain the opinion that the fourth subdivision is here applicable. This subdivision provides that an agreement for the sale of real property or of an interest therein shall be invalid unless the agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. As above noted, the complaint alleges that the defendants verbally agreed to give to plaintiffs 1 per cent. of all gas, oil, and other hydrocarbons produced from the land in return for legal services performed by plaintiffs at defendants' request. This allegation occurs in the first and second causes of action. It does not occur in the third cause of action, but it is evident from the allegations thereof that the cause of action for money had and received is

based on the oral agreement set out in the preceding counts. The prayer of the pleading likewise shows that the basis for the three causes of action alleged is the oral agreement to give 1 per cent. of the oil and gas produced from the land.

The alleged oral agreement of defendants to give to plaintiffs 1 per cent. of all gas, oil, and other hydrocarbons produced and saved from the land amounted to a verbal assignment by the landowners of an undivided interest in oil rights in the land. It has recently been decided by the Supreme Court of this state that such an assignment is an assignment of an interest in real property. *Callahan v. Martin*, 43 P. (2d) 788. The allegation of the complaint that the defendants "verbally agreed" to give 1 per cent. of the oil and gas produced therefore brings the case squarely within the provisions of subdivision 4 of section 1624 of the Civil Code, unless the further allegation that plaintiffs had fully performed their part of the agreement is sufficient to remove the bar of the statute.

[1] It may be observed that the agreement set out in the complaint which forms the basis for the three causes of action alleged in the pleading is an agreement to convey an interest in real property in consideration of the rendition of personal services. The fact that the consideration for defendants' oral agreement was the rendition by plaintiffs of legal services for defendants has, however, no bearing on the question of whether or not the action is barred by the statute of frauds. *Cordano v. Ferretti*, 15 Cal. App. 670, 115 P. 657.

We can see no difference in principle between the legal problem presented by the allegations of the complaint and that which would have been presented if the agreement to give a percentage of the oil to be produced had been made in consideration of the payment by plaintiffs of a specified purchase price. It has been decided that the payment of the purchase price does not constitute such part performance as to entitle the purchaser to equitable relief in the form of a decree of specific performance of an oral agreement to convey land. *Forrester v. Flores*, 64 Cal. 24, 28 P. 107; *Davis v. Judson*, 159 Cal. 121, 113 P. 147. It has also been decided that full performance by one party to an agreement whereby personal services were to be rendered in consideration of an oral promise by the other party to execute a will devising cer-

tain real property to the promisee does not constitute such part performance as to entitle the promisee to equitable relief in the form of a decree enforcing a trust in the land. *Baker v. Bouchard*, 122 Cal. App. 708, 10 P.(2d) 468. The last-cited case would appear to dispose of the contention that the cause of action based on the theory that a trust was created for the benefit of plaintiffs was removed from the operation of the statute of frauds by reason of the allegation of full performance by plaintiffs of their part of the agreement.

[2,3] It is therefore our conclusion that the complaint shows on its face that the agreement which forms the foundation for the various causes of action therein alleged is an oral agreement to assign or to transfer an interest in real property which is rendered unenforceable by the provisions of subdivision 4 of section 1624 of the Civil Code, and that the allegation that plaintiffs had fully performed their part of the agreement does not constitute an allegation of such part performance as to render the pleading immune to the objection that it is barred by the provisions of the above-mentioned statute.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



6 Cal.App.2d 561

**HALLA v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N**

et al.

Civ. 9655.

District Court of Appeal, First District,
Division 2, California.

May 3, 1935.

Hearing Denied by Supreme Court
July 1, 1935.

1. Witnesses ⇨ 149(2)

In action against broker's executor for money allegedly converted by broker, plaintiff held not entitled to testify regarding any matter or fact occurring before death of broker.

2. Evidence ⇨ 75

In action against broker's executor, presumption was that available evidence not pro-

duced by plaintiff was unfavorable to her (Code Civ. Proc. § 1963, subd. 6).

3. Executors and administrators ⇨221(4)

Plaintiff relying on circumstantial evidence to show that at time of his death decedent in equity and good conscience owed plaintiff certain money could not establish the debt, unless existence of debt was only conclusion that could reasonably be drawn from facts proved.

4. Evidence ⇨587

A theory is not established by circumstantial evidence unless facts relied on are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is insufficient that they be consistent merely with that theory.

5. Executors and administrators ⇨221(4)

Circumstantial evidence in action against executor of deceased realty broker *held* insufficient to show existence of broker's indebtedness to principal where numerous transactions admitted of other inferences than existence of debt claimed (Code Civ. Proc. § 1963, subds. 6, 7).

6. Brokers ⇨4

Surety on realty broker's bond *held* liable for deceased broker's conversion of money which was paid to broker by principal, not as loan, but for purpose of purchasing realty (Gen. Laws 1931, Act 112).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Francesca Halla against the Bank of America National Trust & Savings Association, executor of the last will and testament of A. Porta, deceased, and the Commercial Casualty Insurance Company. From a judgment for defendants, plaintiff appeals.

Affirmed as to first-named defendant and reversed as to second-named defendant.

Prior opinion, 42 P.(2d) 1097.

R. L. Chamberlain and H. H. Linney, both of San Francisco, for appellant.

W. Urie Walsh and Herbert C. Kaufman, both of San Francisco, for respondent Bank of America Nat. Trust & Savings Ass'n.

Richard Pausch and Theodore Tamba, both of San Francisco, for respondent Commercial Casualty Ins. Co.

STURTEVANT, Justice.

The plaintiff commenced an action to recover a judgment for money. She named as defendants Bank of America National Trust & Savings Association and Commercial Casualty Insurance Company. On the trial before the court sitting without a jury, after all of the evidence had been received and both parties had rested, the trial court granted motions for a nonsuit in favor of Bank of America National Trust & Savings Association, and also ordered judgment in favor of Commercial Casualty Insurance Company. The plaintiff made a motion for a new trial. Her motion was denied and she has appealed. In her complaint she alleged that she is a citizen of San Francisco; that the Bank of America National Trust & Savings Association is a corporation and is the executor of the last will and testament of A. Porta, deceased; that the Commercial Casualty Insurance Company is a corporation; that on the 2d day of January, 1932, there was issued to A. Porta a license to act as a real estate broker in the name of Progressive Realty Company, and as a condition A. Porta was required to file and did file with the commissioner of real estate a bond in the sum of \$2,000 executed by the Commercial Casualty Insurance Company and conditioned as required by law; that the contents of the bond were as stated in the document pleaded in *haec verba* in the plaintiff's complaint; that on the 8th day of February, 1932, " * * * plaintiff employed" said A. Porta as a real estate agent to purchase for her certain real estate (not describing it) in San Francisco and paid to him \$3,000 to enable him to make the purchase; that A. Porta did not make the purchase but converted the \$3,000 to his own use; and that on the 10th day of February, 1933, plaintiff filed with the executor her claim for \$3,000 which it has not allowed. The claim is not set forth in the complaint, but the answers admitted the filing thereof. As to what may be the contents, the court is not advised.

[1-5] We will first consider the case as made against the defendant bank. As from the beginning, both counsel agreed that as to the bank the plaintiff was not entitled to testify regarding any matter or fact occurring before the death of the deceased. Four documents which indicate the payment of moneys were produced from the possession of the plaintiff and introduced.

Taking up each chronologically, Plaintiff's Exhibit No. 3 is a statement reciting disbursements by the decedent down to April 9, 1930, which amount to \$210.44. He charges himself with "interest on \$2,000 at 7% from October 1, 1929 to April 1, 1930," in the sum of \$70, which left a balance due plaintiff of \$140.44. He then wrote an addendum, "Received from Miss F. Halla \$140.50 as payment on house." No evidence was introduced showing what house. Plaintiff's Exhibit No. 4 is of like tenor. It shows payments by deceased of \$152.19. In an addendum thereto he charged himself with "interest \$35 from April 1 to July 1, 1930," and wrote a self-serving declaration, "Bal. due Progressive \$117.19." On the main document he wrote, "Paid August 12, 1930." Plaintiff's Exhibit No. 5 is dated August 7, 1931. It shows a purchase or sale of \$7,900. From its face it may be inferred it was a purchase of real estate bought subject to existing bank mortgage, and that \$1,500 was paid. But by whom, plaintiff directly or by deceased for plaintiff's account? The record shows nothing to answer the question. On its face it acknowledges the receipt of \$100 for expenses, but it enumerates expenses aggregating \$103.10, bank interest \$15, and shows a balance due Progressive Realty Company of \$18.10. Then to that instrument there is an addendum, "Applied July 30 interest \$35.00"; he subtracts \$18.10; and the balance is \$16.90. He writes, "Paid in full, A. Porta." Paid by whom, himself or the plaintiff? The record does not show. If the interest mentioned was his interest payable to the plaintiff, the balance was properly struck, but as a receipt the document should have been signed by the plaintiff. If the interest was due decedent, he should have added instead of subtracting and the paper should have been signed by decedent. Finally, Plaintiff's Exhibit No. 2 is: "Received from Mrs. Francesca Halla on March 22nd, 1929, \$2,000.00. Received on February 8th, 1932 from Mrs. Halla \$1,000.00. A. Porta." There is evidence in the record tending to show the purchase by the decedent for the plaintiff's account of two or more different pieces of real estate and of the sale of at least one piece for her account, but the record does not give the facts nor dates of any one of the transactions. Mr. Ferrera became an employee of the decedent in 1930. He testified he knew the facts regarding the plaintiff's purchase through the decedent of the property at 1306 York street, but he was not asked to state the facts. Plain-

tiff's Exhibit 5 is dated August 7, 1931. It shows the purchase or sale of property the price of which was \$7,900. It contains a detailed list of the expenses. As the purchaser usually pays such expenses, we assume the transaction was a purchase. The record does not contain any evidence giving any description of the property involved. The Rhode Island street property was sold. When and for how much the record is silent. At least one transaction, according to the exhibits, was conducted through a title company, but no representative of any title company was called as a witness. All deeds were presumptively placed of record, but such facts were not introduced in evidence. The record also discloses that from May 1, 1930, the plaintiff was indebted to the Hibernia Savings & Loan Society on a note bearing interest at \$29.33 per month and that the decedent had charge of the making and did make the payments. However, no representative of the bank was called as a witness and the record does not disclose what payments, if any, were made after August 7, 1930. It will be presumed that the evidence on these outstanding factors which we have just enumerated would have been against the plaintiff (Code Civ. Proc. § 1963, subd. 6) if it had been introduced. Mr. Bruzza, the owner of the property at 847 Alabama street, testified that the day before the death of the decedent the latter called on him, asked his price, and stated that decedent made the remark that he had a client who had already given him money to buy the property—two or three thousand dollars—and that she had no more money. No name was mentioned. The witness had never seen the plaintiff. He had heard a woman had called and examined the property. No contract was made, but Porta said he would return the next day. He died that night. The bank called as a witness an expert who testified that he had examined the books and papers of the deceased for the purpose of ascertaining how the account stood between the plaintiff and the deceased. Among other things, he testified regarding the purchase of another piece of property, 1372 Rhode Island street, for the plaintiff. The record showed that the price was \$5,400; that a mortgage in the sum of \$3,000 was assumed, leaving a balance of \$2,400. On that balance \$2,000 was paid as a deposit and a check for \$400. The record does not show who made the payments. The witness was unable to give the date. The same witness testified that the last-named prop-

erty was later sold and on February 10, 1931, the deceased paid the plaintiff \$2,032.94. As we have shown in another place, the record shows that the Rhode Island street property was bought about July 29, 1929, hence the expert accountant's evidence is not helpful. The same witness testifying regarding the accounts as he found them stated that there would be a balance due the deceased of \$403.31. As to this defendant, the trial court granted a motion for a nonsuit. In effect the theory of the plaintiff was that in equity and good conscience the decedent, at the time of his death, held \$3,000 of her money which he should pay to her. 17 Cal. Jur. 602. She attempted to prove her case by circumstantial evidence. To do so she was bound to meet the rule that is concisely stated in 10 Cal. Jur. 1157, as follows: "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for they may be true and yet they may have no tendency to prove the theory." From the evidence above set forth, the trial court could find that on March 22, 1929, the decedent received from the plaintiff \$2,000. If that were all, the trial court could presume said sum was owing to the decedent. Code Civ. Proc. § 1963, subd. 7. But the evidence goes further and shows that on February 10, 1931, he paid her \$2,033.94. It also shows he paid her interest to July 30, 1931, in the sum of \$35, but on what sum and for what time does not appear. He received \$1,000 from her on February 8, 1932. But in view of the other evidence concerning sales and purchases, receipts and disbursements, it may not be said the only conclusion that can fairly or reasonably be drawn from the facts is that the decedent at the time of his death still held for the plaintiff's account the said sum of \$3,000 or any part thereof. As these matters arose on a motion for a nonsuit after all of the evidence had been received, the rule governing the trial court is stated in *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427, at page 429, 264 P. 756. Giving consideration to the entire record, including the evidence, we cannot say the trial court erred in granting the nonsuit.

[6] As to the Commercial Casualty Insurance Company, the above evidence is ap-

plicable and there is some additional evidence which must be taken into consideration. The term of the bond of the defendant was from January 1, 1932, to December 31, 1932. As to \$2,000 of the plaintiff's claim, the evidence shows it was paid to the decedent as a loan on March 22, 1929. It is clear the bond did not cover that item. The other item, \$1,000, was paid February 8, 1932. The defendant asserts it was a personal loan and, as such, not covered by a bond executed under the California Real Estate Act. 1 Deering's Gen. Laws, 1931, p. 25, Act 112. As has been noted above, there was evidence that the relation of debtor and creditor existed between the decedent and the plaintiff for several years prior to his death. But the plaintiff testified that when she paid to the decedent \$1,000 on February 8, 1932, she directed the decedent to buy her a lot and that the relation of debtor and creditor should cease. However, continuing her testimony, she stated she did not designate a lot, but proceeded to examine different offerings and it was not until October 29, 1932, that she designated a lot. On that date she selected No. 847 Alabama street and told Porta to buy it. Porta said the price was \$3,550. She replied she could only pay \$3,000 because it was the only money she had. Porta called on Bruzza, the owner, who held out for \$3,500 on the sales price. In talking to Bruzza, Porta said he had a check for \$3,300. That was sales talk, as the statement does not square with any other testimony in the record. There is no evidence that the \$1,000 was ever repaid to the plaintiff. That it was a loan by the latter to the decedent is negatived by the plaintiff's testimony which we have quoted. That it was invested by the decedent for the plaintiff as directed is not even claimed. It follows that the judgment in favor of the Commercial Casualty Insurance Company should be reversed.

The judgment in favor of Bank of America National Trust & Savings Association is affirmed, and the judgment in favor of Commercial Casualty Insurance Company is reversed. The plaintiff will have judgment for her costs against the Commercial Casualty Insurance Company. The Bank of America National Trust & Savings Association will have judgment for its costs against the plaintiff.

We concur: NOURSE, P. J.; SPENCE, J.

6 Cal.App.2d 609

BERMAN v. BLANKENSHIP MOTORS et al.
Civ. 9751.

District Court of Appeal, Second District,
Division 2, California.
May 6, 1935.

Rehearing Denied June 5, 1935.

1. Negligence ⇨134(4)

Truck driver's testimony that plaintiff in action for injuries, alleged to have been caused by truck rolling down sloping floor of shipping room after being left unattended, said that he was injured through his own negligence in pushing truck, and expert testimony that truck would have had to run uphill to injure plaintiff, as he claimed, *held* sufficient to support decision for defendant.

2. Appeal and error ⇨690(3)

Appellate court cannot find error in admission of expert testimony, where it cannot be determined from abbreviated bill of exceptions whether all elements of admissibility of such testimony were established.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Charles B. Berman against the Blankenship Motors, a corporation, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, 140 Cal. App. 134, 34 P.(2d) 1035.

William P. Redmond, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] This is an appeal from a judgment in a personal injury action in favor of the defendant. Appellant testified that while standing in a shipping room of a building in Los Angeles, a truck, which had been stopped and left unattended by a driver, employed by respondent, rolled down the sloping floor and struck him causing his injuries. A fellow employee corroborated this story, and added the factor that he grasped the emergency brake but was unable to stop the truck. The driver of the truck testified that he set the brakes of the truck and went upstairs, and that when he returned shortly thereafter he found appellant seated

on the back of the truck and that appellant then stated that he (appellant) had pushed the truck from one place to another and in doing so was injured through his own negligence. The defense, over objection, introduced the testimony of an expert who testified to a measurement and examination of the premises and that the truck would have had to run up hill for the accident to have occurred as claimed by appellant, and that no truck could possibly have rolled of its own accord in the manner claimed.

The court appointed an expert who testified without objection that the truck involved would have had to run up hill to injure appellant as he claimed.

The decision of the trial court in favor of respondent is amply supported by the evidence.

[2] It cannot be determined from the very abbreviated bill of exceptions whether or not all of the elements of admissibility were established for the introduction of testimony by the defense expert. We cannot therefore find error therein.

We do not wish to be understood as holding that expert testimony is admissible to prove as obvious a fact as that a truck, without the engine running, will not run up an incline of its own accord.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



6 Cal.App.2d 723

WITHROW v. BECKER.
Civ. 825.

District Court of Appeal, Fourth District,
California.
May 13, 1935.

1. Trial ⇨241

In action for injuries sustained by truck driver who had entered intersection and was struck by automobile while truck driver was attempting to enter another intersecting street, instruction containing statute relating to right of way at intersection *held* not erroneous on ground that truck driver was not approaching intersection, but that he had stopped, and his right to proceed was gov-

erned by statute providing that driver, before starting vehicle, shall first see that such movement can be made in safety, where truck driver's conduct at both intersections was in question, and court gave instruction which motorist claimed should have been given (St. 1925, p. 413, § 130 (a); St. 1929, p. 541, § 131 (a)).

2. Trial ⇨296(3)

Alleged error in instructing that, if truck driver entering intersection looked to right and observed motorist approaching at distance of 100 yards or more, then truck driver had right to assume that motorist would travel at lawful rate of speed and under such control that automobile could be slowed down or brought to stop to enable truck driver to proceed through intersection with safety, and that truck driver was under no duty to give further heed to automobile, *held* not reversible, in view of evidence and other instructions which fully covered truck driver's alleged contributory negligence (St. 1925, p. 413, § 130 (a); St. 1929, p. 541, § 131 (a); Const. art. 6, § 4½).

3. Trial ⇨252(8)

In action for injuries sustained in automobile collision, instruction that in fixing damages jury must consider all facts and circumstances and fix damages at such sum as from evidence jury might deem proper *held* erroneous as too broad, especially in view of testimony to effect that defendant was covered by insurance.

4. Appeal and error ⇨1068(4)

Where testimony in automobile collision case disclosed that defendant was covered by insurance, error in instructing that in fixing damages jury should consider all facts and circumstances and fix damages at such sum as from evidence jury might deem proper *held* not corrected by reducing \$8,000 verdict to \$4,500.

5. Damages ⇨62(2)

Plaintiff suing for injuries sustained in automobile collision had duty to minimize his damage.

6. Damages ⇨131(4)

\$4,500 as reduced from verdict for \$8,000 to truck driver who sustained hernia and was treated by doctor for 3 weeks *held* excessive, where physician testified that hernia could be completely cured by an operation and no reason appeared why operation was not performed soon after accident, which occurred 15 months before trial.

Action by F. W. Withrow against J. F. Becker. From a judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Russell & Heid, of Tulare, for respondent.

BARNARD, Presiding Justice.

From a judgment for damages for personal injuries suffered in an automobile collision, the defendant has appealed.

The collision occurred about 4 p. m. on October 29, 1930, on Olive street, just outside the city limits of Porterville. Olive street runs east and west, is 60 feet in width, has a 15-foot pavement along its center, and is oiled from either side of the pavement to the curb line. Villa street runs north from Olive and California street runs south; the west line of California street being 12 feet east of the east line of Villa street. There is thus a jog or offset in this intersection, or it might be described as two intersections 12 feet apart.

On this afternoon the respondent, driving a one-ton truck, was proceeding south on Villa intending to proceed across Olive and south on California. At the same time the appellant was proceeding east on the paved portion of Olive. As the respondent neared the north line of Olive street, he stopped and looked to the right and the left. He testified that he saw appellant's car coming from the west; that it was then "a couple of blocks away," although he later estimated the distance as a hundred yards or more; that the other car was coming fast; and that "I seen I had lots of time and I went right across." An independent eyewitness testified that, at the time the respondent shifted gears and started across Olive street, the appellant's car was between 100 and 150 yards away, and that it was approaching at over 40 miles an hour. The respondent started across Olive street in first gear and changed to second gear, going at from 5 to 10 miles an hour. Instead of going around the theoretical center of the intersection of Olive and Villa streets, he cut diagonally across in an easterly direction toward the entrance to California street, and he did not give an arm signal. When his truck had gotten across the paved portion of Olive, or practically so, and as it

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

was about to enter California street, it was struck by the appellant's car, causing the injuries in question. There is some evidence that this collision occurred about 15 feet south of the paved portion of Olive, while other evidence is to the effect that it occurred when all of the wheels of the truck were south of the pavement, but while the body of the truck extended over the pavement some 2 or 3 feet.

The appellant testified that he had been familiar with this crossing for years; that as he approached the intersection he was traveling from 35 to 40 miles an hour; that he could not say whether or not he had looked to see whether cars were approaching from Villa street; that he did not see the truck until he was within 30 feet of it, at which time it was right in front of him on the highway; that he could not go to the left because other cars were approaching on the north side of the highway; and that he pulled over to the right slightly off the highway and applied his brakes, but could not stop within the 30 feet. He also testified that he had a new car with four-wheel brakes which were in perfect condition. All of the other evidence is to the effect that no other cars were approaching from the east on the north side of the pavement; that two cars were standing to the north of this pavement; that there was ample room for the appellant to have gone to his left; and that, if he had done so and stayed on the pavement, the accident would not have occurred. There is no evidence of any stop sign at this intersection.

[1] The appellant contends that the jury was erroneously instructed. It is first argued that the court should not have given an instruction containing subdivision (a) of section 131 of the California Vehicle Act (St. 1923, p. 560, as amended by St. 1929, p. 541), as then in force, relating to the right of way at an intersection. It is argued that the respondent was not approaching the intersection of Villa and Olive, within the meaning of the section referred to, but that he had stopped and that his right to proceed was governed by subdivision (a) of section 130 of the act (St. 1923, p. 558, as amended St. 1925, p. 413), providing that a driver before starting a vehicle shall first see that such movement can be made in safety. And further, that the collision occurred in the intersection of Olive and California while both cars were proceeding over the same highway, Olive street. The respondent entered the paved highway at

the intersection of that street and Villa street, and, while the accident occurred after he entered Olive and while he was leaving that street at its intersection with California street, his conduct at both intersections was in question. The instruction attacked was entirely appropriate in connection with his entering Olive street. And the court also gave the instruction which appellant argues should have been given, one containing the provisions of subdivision (a) of section 130 of the act, including the provision for giving a signal when turning, which lays down the rule he should have complied with in turning from Olive into California street.

It is next contended that the court virtually took the issue of contributory negligence from the jury by giving the following instruction: "If you believe from the evidence that as plaintiff entered the intersection of Villa and Olive Avenues he looked to the right and observed defendant's automobile approaching at a distance from the intersection of one hundred yards, or more, then you are instructed that plaintiff had the right to assume that defendant's automobile would travel at a lawful and prudent rate of speed and under such control that it could be slowed down, or if necessary brought to a stop to enable plaintiff to proceed through the intersection with safety and under such circumstances plaintiff was under no duty to give further heed to defendant's automobile."

[2] Many instructions on contributory negligence were given, including one to the effect that, if the jury believed from the evidence that the respondent stopped before entering the intersection and looked in the direction from which the other car was approaching, that the other car was then at such a distance from the intersection as to lead an ordinarily prudent person to believe that a safe crossing could be made, and that in proceeding across the intersection the respondent acted as an ordinarily prudent person would have acted under the circumstances, it should not find him guilty of contributory negligence. In another, the jury was told that it was the duty of the respondent to keep as alert a lookout toward any automobile he knew to be approaching as a reasonably prudent man would keep under the circumstances; that a failure to keep such a lookout would be negligence; that, if it found that the respondent, in approaching this intersection, failed to keep such a lookout for approaching automobiles as a rea-

sonably prudent man would keep under the circumstances, such failure constituted negligence; and that, if it further found that such negligence proximately contributed to the accident, the verdict must be for the appellant. In addition to these other instructions, the one in question was given. The appellant argues that this instruction was prejudicially erroneous, and cites *Galway v. Guggolz*, 117 Cal. App. 639, 4 P.(2d) 290, where a similar instruction, but relating to a distance of 100 feet, was held erroneous. That case involved a through highway protected by a stop sign, and an order granting a new trial was being sustained. In the light of common experience, it might almost be said that a driver who, at the time he enters an intersection which is not protected by a stop sign, sees another car 300 feet or more away from the intersection, has a right to assume that the driver of the other car will control the same, and that it will be safe for him to proceed without giving that car further attention. Conceding, however, that the instruction is erroneous, and it must be admitted that it would have been better to have omitted the same, we are of the opinion that it does not require a reversal under the circumstances here appearing. Its effect was considerably modified by the other instructions which fully covered the situation. The only negligence attributed to the respondent by the appellant is his failure to give an arm signal and his failure to pass around the theoretical center of the intersection. To this may be added his failure to wait until the approaching car had passed. Taking all of the evidence together, it is unreasonable to suppose that any jury would think that the respondent should have so waited. Under the circumstances, an arm signal would hardly have been seen by the appellant in any event, especially when he himself testifies that he did not even see the entire truck in time to stop, although it had entered the intersection, crossed the same, crossed the intervening 12 feet between that and the next intersection, and entered that intersection, and all this in broad daylight. It is equally impossible to see how any cutting of the corner by the respondent could have had any effect on the accident, under these circumstances, and the entire evidence indicates that, if the respondent had gone around the center of the intersection, he would not have so nearly gotten off the highway, and his position, instead of preventing, would have aggravated, the accident. It is not reasonable to suppose that

any error in this instruction relating to the question of respondent's negligence had any effect on the jury in deciding the further question as to whether such negligence, if any, was one of the proximate causes of the accident. After reading all of the evidence, we are far from convinced that a miscarriage of justice has occurred in the respect now under consideration, and we therefore hold that the giving of this instruction does not require a reversal, in view of article 6, § 4½, of the Constitution.

[3,4] The appellant further maintains that the damages allowed are excessive and that the court erred in one of the instructions on the measure of damages. These contentions must be sustained. The jury brought in a verdict for \$8,000, which, on proceedings for a new trial, was reduced to \$4,500. The respondent testified that immediately after the accident the appellant told him that he was covered by insurance. The court instructed the jury that in fixing the damages it must take into consideration, among other things, "all the facts and circumstances in the case and fix the damages at such sum as from the evidence you may deem proper." We think this instruction was too broad under the circumstances of this case, especially in view of the testimony in the record to the effect that the appellant was covered by insurance. This may have had its effect upon the verdict which, as rendered, is so excessive as to indicate passion or prejudice upon the part of the jury. Nor do we think the matter has been sufficiently corrected by the reduction made in connection with the motion for a new trial.

With respect to his injuries, the respondent testified that immediately after the accident he felt numb all over, that one of his fingers was "smashed," and that the next day he went to a doctor who treated him for about three weeks. A hernia then developed, and the respondent testified that since that time he had been able to do light work only, that he had obtained some employment since the injury, but had been unable to do heavy work because of the pain in his side, and that he was still unable to perform his usual work. He also testified with reference to his finger: "It is just a little stiff, that is all. I can place my hand in a normal way." The physician who attended him testified that the hernia was the result of the accident, but that the same could be completely cured by an operation; that this operation would cost \$250 for doctor bills and \$75 or \$80 for hospitalization and nurs-

ing; that after such operation he would have to remain in bed for about two weeks; and that he would then be unable to do any work which would require heavy lifting for about two weeks.

[5,6] It was the duty of the respondent to minimize his damage in every way. In *Baker v. Borello*, 136 Cal. 160, 68 P. 591, 593, the court said: "A party injured by the tort of another must not, by his negligence or willfulness, allow the damages to be unnecessarily enhanced; and, if he does so, he cannot recover for the increased loss." While there was some evidence of pain and suffering, the evidence shows that this was nearly all the result of the hernia which the respondent suffered. The respondent alleged in his complaint that it would be necessary for him to undergo an operation for the correction and cure of the hernia. No reason appears why this was not done soon after the accident, which occurred a year and three months before the trial, and it is fully apparent that such an operation would have greatly reduced such damage as appears from the plaintiff's inability to work. The evidence is entirely insufficient to justify the amount of damages awarded, and, in our opinion, the appellant is entitled to a new trial on that issue.

The judgment is reversed and the cause remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondent upon the determination of that issue.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 651

**BANK OF AMERICA NAT. TRUST & SAV-
INGS ASS'N v. SCHUMACHER.**
Civ. 9519.

District Court of Appeal, Second District,
Division 2, California.

May 8, 1935.

1. Contracts Ⓒ143

In construing contract, no part of contract can be ignored, and if possible some val-

ue must be given to each provision in contract.

2. Bills and notes Ⓒ129(3)

Where note payable on demand was executed with implied agreement that demand would not be made so long as \$100 monthly payments were made, unpaid balance of note became due and payable when maker failed to make payments and demand was made by payee, notwithstanding absence of acceleration clause.

3. Bills and notes Ⓒ539

Finding in action on note that stock which had been pledged as collateral security for note had no value, if not supported by evidence, was not reversible error, since pledgee can maintain suit to recover amount of debt without either exhausting subject of pledge or proving that pledged property has no value.

4. Pledges Ⓒ55

Statute providing that there can be but one action for recovery of debt secured by mortgage, and requiring foreclosure of mortgaged property, does not prevent pledgee from maintaining independent suit to recover amount of debt without first exhausting subject of pledge (Code Civ. Proc. § 726).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against M. H. Schumacher. From the judgment, the defendant appeals.

Affirmed.

Davis & Thorne, by Lester Thorne, all of Los Angeles, for appellant.

Edmund Nelson, G. L. Berrey, and Howard Waterman, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by defendant from a judgment for the amount found due on a promissory note. By the express language on its face, the note was payable "on demand." At the outset of the transaction between the parties, the plaintiff sent the unexecuted note to the defendant for execution accompanied with a letter, which read in part: "You will notice that the new note is payable on demand and this is done for the reason that Mr. Moore informed us that payments of \$100 per month were going to

be made." In a letter returning the note duly executed, the defendant said: "I am herewith enclosing note. * * * I have made arrangements with my secretary to forward you \$100.00, to be applied upon this note, every month." To this the bank replied: "Notice has been made on the new note that payments of \$100 will be made on the twenty-sixth day of each month beginning January 26, 1931, interest to be payable quarterly. Notice of these instalments will be sent to you approximately ten days prior to the date due." Eight months later the bank wrote the defendant: "As we are endeavoring to place a definite maturity on all loans carried by this bank, we are inclosing a ninety-day renewal of your obligation, which we will be pleased to have you execute, as indicated, and return to this office. This renewal will not affect the status of your obligation in any way, nor will it deter you from continuing your \$100 payments as in the past." The defendant did not sign the renewal note. Almost a year later, when he had failed to make the \$100 payments for more than two months and was back in his interest payments, the bank made demand for payment of the note and thereafter commenced this action.

[1, 2] It is the first contention of the defendant that the contract in its entirety constituted an agreement to pay the amount designated in the note in monthly installments and not on demand; and that, since there was no acceleration clause in the agreement, only two installments were due at the time suit was commenced and not the full unpaid portion of the debt. Such contention ignores the direct promise of the note to pay "on demand." In construing a contract, it must be taken up by its four corners, none of it may be ignored, some value must be given to each of its provisions if it be possible to do so. The promise to pay on demand is not inconsistent with the contemplated payments of \$100 per month. The most that can be said for the letters is an implied agreement that, as long as the \$100 payments are kept up, the bank will not make a demand. When the payments were not made by the defendant and demand was made by the bank, the unpaid balance of the note became due and payable. There was no necessity for an acceleration clause.

[3, 4] The only other contention made by the defendant is that there was no evidence

to support a finding that certain shares of stock which were pledged as collateral security by the plaintiff were of no value. Section 726, Code of Civil Procedure, which provides that there can be but one action for the recovery of a debt secured by mortgage, and which requires foreclosure of the mortgaged property, is inapplicable to pledges. A pledgee, without first exhausting the subject of the pledge, or, in lieu thereof, alleging and proving that the pledged property is of no value, may maintain an independent suit to recover the amount of the debt. See 21 Cal. Jur. 358, and cases cited. The finding complained of was surplusage. There is no ground for reversal in this contention.

Judgment affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 560

PEOPLE v. GILBERT.

Cr. 1423.

District Court of Appeal, Third District,
California.

May 1, 1935.

Criminal law ☞ §1182

Failure of appellant, after filing transcript on appeal from a conviction in District Court of Appeal, to file brief or make appearance when case was called for hearing, held to justify affirmance of conviction (Pen. Code, § 1253; St. 1929, pp. 537, 544, §§ 112, 141).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Earl E. Gilbert was convicted of manslaughter, and violations of the California Vehicle Act, sections 112 and 141, St. 1929, pp. 537, 544, §§ 112, 141, and he appeals.

Affirmed.

Harold Wyatt, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of the fol-

lowing: Manslaughter, a felony; violation of section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537), a public offense; violation of section 141 of the California Vehicle Act (St. 1923, p. 562, as amended by St. 1929, p. 544), a felony.

The transcript on appeal was filed in this court February 14, 1935. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 1, 1935. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



6 Cal.App.2d 654

Ex parte MOSELEY.

Cr. 1431.

District Court of Appeal, Third District,
California.

May 8, 1935.

1. Automobiles ☞353

Statute stating permissible speeds under different conditions, providing that vehicles should be driven at reasonable speed in view of conditions, and that speeds in excess of permissible speeds should be "prima facie" evidence of violation of statute, *held* to mean that proof of speeds in excess of permissible speeds casts burden upon defendant charged with violation of statute to prove that speed was not unreasonable in view of conditions, and not that speeds in excess of permissible speeds were unlawful (St. 1923, p. 553, § 113 (a-c)).

"Prima facie" means as it first appears; at first sight; at first view; on its face; on the face of it; on the first appearance.

[Ed. Note.—For other definitions of "Prima Facie," see Words & Phrases.]

2. Criminal law ☞980(1)

Conviction on plea of guilty to charge contained in complaint, alleging that defendant at certain time and place had driven automobile on state highway at approximately 70 miles per hour, and that lawful speed was 45 miles per hour, *held* error since complaint

charged no offense (St. 1923, p. 553, § 113 (a-c)).

Application by Lincoln V. Johnson for a writ of habeas corpus for and on behalf of Tomlinson I. Moseley.

Writ granted, person on behalf of whom petition was filed discharged, and his bail exonerated.

C. Huntington Jacobs, of San Francisco, for petitioner.

George Mordecai, Dist. Atty., of Madera, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 31st day of January, 1935, a complaint was sworn to before Le Roy E. Bailey, a justice of the peace of the Third township of the county of Madera, charging Tomlinson I. Moseley with the crime of speeding, alleged to have been committed as follows: That the said Moseley, on or about the 27th day of January, 1935, at and in the county of Madera, state of California, did willfully and unlawfully drive a motor vehicle upon the California state highway, at a rate of speed of approximately 70 miles per hour, whereas the lawful rate of speed at such place and time was 45 miles per hour. Upon his arraignment Moseley entered a plea of guilty and was sentenced to five days in the county jail. The cause is now before us upon a petition for a writ of habeas corpus, alleging, among other things, that the complaint does not state any offense or cause of action, and that the justice's court had no jurisdiction. Notwithstanding that the respective counsel have given a great deal of attention to the subject of the jurisdiction of the justice's court by reason of the views hereinafter expressed, we do not need to give that objection to the proceedings further consideration.

[1] The validity of the proceedings under consideration depend upon the construction that should be given to section 113 of the California Vehicle Act, as amended in 1923, by adding thereto the following provision known as "Subdivision c," to wit: "In all charges for a violation of this section, speeds in excess of those set forth in subdivision b of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section, and every notice to appear and every complaint

charging a violation of this section shall specify approximately the speed at which the defendant is alleged to have driven and exactly the lawful speed at the time and place of the alleged offense." St. 1923, p. 552, tit. 9.

Section 113, *supra*, lays down a basis for governing drivers of motor vehicles upon the highway in the following words: "(a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

Subject to the provisions and prohibitions set forth in subdivision "a," the section then specifies that it shall be lawful to drive at seven different rates of speed, depending upon conditions of the highway set forth in the section. These seven different specifications are all couched in permissive language, and not expressed in a prohibitory form.

Beginning with the act of the Legislature approved May 10, 1915 (St. 1915, pp. 397, 409), section 22 of the act, after setting forth in subdivision "b," the provisions now found in subdivision "a" of section 113, *supra*, provided: "That it shall be unlawful to drive at a rate of speed in excess of thirty miles an hour," etc., under certain conditions requiring a lesser rate of speed not necessary to be considered herein.

Section 22 of the act approved May 10, 1917, pp. 382, 404, contained the same prohibitory provisions, making it, in so many words, unlawful to drive in excess of the speeds therein mentioned. Section 22 of the act of the Legislature approved May 2, 1919 (St. 1919, pp. 192, 220), is worded in like prohibitory language; the only change being in the permitted rate of speed.

In 1923, as we have stated, subdivision "c" was added to section 113, *supra*. The prohibitory language of subdivision "b" was changed to the permissive form, and subdivision "c" added, controlling the evidentiary weight of testimony that a vehicle was being operated at a speed in excess of any one of the seven specifications. The language of these subdivisions leads us to the conclusion that the Legislature intended, and could only have intended, that speeds in excess of those mentioned should not constitute, in and of themselves, substantive of-

fenses. We will repeat a portion of the language of subdivision "c," to wit: "In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as *prima facie* but not as conclusive evidence of a violation of this section." *Prima facie* evidence of what? Not, for instance, that one has driven in excess of 45 miles per hour, if driving in excess of 45 miles an hour is, in and of itself, a substantive offense. Subdivision "c," to use an historic phrase, becomes absolutely innocuous. It certainly cannot be that the Legislature intended to say that a speed in excess of 45 miles an hour is a crime, and then require *prima facie* evidence to make that a crime which has already been declared as such. We think the language means, and the Legislature intended, that speeds in excess, for instance, of 45 miles an hour, is *prima facie* evidence of a violation of the prohibitory provisions of the section, which are found only in subdivision "a"; that is, a speed in excess of 45 miles an hour, for example, is a greater speed than is prudent, reasonable, or proper, having due regard to the traffic, surface, and width of the highway, and that such driving upon a public highway, at such speed, is to endanger the life, limb or property of some person.

The section then gives the alleged offending vehicle driver an opportunity to rebut the *prima facie* effect of the excessive speed, and show that none of the prohibitory provisions of the section have been violated. It is illogical to reason that a speed in excess of 45 miles an hour is a substantive offense, and then to permit the alleged offender to come into court and prove, under subdivision "c," that driving in excess of 45 miles an hour is not an offense. There are just two questions involved in a criminal proceeding—guilty, or not guilty—not that an offense has been committed by driving in excess of 45 miles an hour, and then the admission of testimony on the part of the defendant that the Legislature incorporated in the subdivision an excuse for committing a crime. Such reasoning, we think, almost convicts the Legislature of an absurdity in denouncing a certain act a crime and then providing that the person accused of committing the crime may, without showing that he has not committed any crime, offer an excuse for committing the very crime with which he is charged. In this particular we are aided by the definition of the words "*prima facie*" found in 49 C. J., p. 1346, to

wit: "As it first appears; at first sight; at first view; on its face; on the face of it; on the first appearance," etc. Thus, driving at a speed in excess, say, of 45 miles per hour, on the face of it appears to be violating some one of the prohibitory provisions set forth in subdivision "a" of section 113, supra; not, on the face of it, that the vehicle is being driven in excess of 45 miles per hour; that is unquestioned; taken for granted. The highway patrolman, on the face of it, is justified in apprehending the vehicle driver and charging him with having violated some one of the provisions of the prohibitory portion of the section; not with his going, on the face of it, over 45 miles per hour. The person apprehended, if he desires to contest the charge, has his day in court and the opportunity to refute the same, and show that a speed in excess of 45 miles an hour, at a time and place where the vehicle is being so driven, does not violate any of the prohibitory provisions of the section. Thus, the prima facie rule protects the officer in giving a citation, and afterwards, in filing a complaint, but it does not change the fact that the court must determine from the testimony, if any is offered, as to whether the offending driver has or has not violated some one of the prohibitory provisions found in subdivision "a" of section 113, supra. In the first instance the officer has the advantage of the prima facie rule; that is, on the face of it it appears that an offense has been committed by driving in a manner prohibited by subdivision "a," supra. As against this prima facie showing, the driver of the vehicle may introduce testimony sufficient to convince the court that the speed was proper, having regard for the traffic, surface, and width of the highway, and that the speed at which he was driving did not endanger the life, limb, or property of any person.

In this connection we may state that there is both an actual and a potential hazard involved in the driving of a motor vehicle, and that the court before which an action is tried may take both the actual and potential hazard into consideration. For illustration, we state the following: Where the highway is wide and smooth, not being used by other vehicles, and there are no intersections toward which the vehicle is being driven, the testimony might convince the court, taking into consideration these facts, that none of the provisions of subdivision "a," supra, were being violated. On the other hand, if a vehicle is approaching

an intersection, and the speed is such that immediate control may not be had to avoid a collision with a vehicle using the intersecting highway, the court might very well conclude that the provisions of subdivision "a" were being violated. This rule, we think, would apply whether there was or was not a vehicle approaching the intersecting highway. There is not only a possibility, but there is always a probability that intersecting highways will be used, which presents at all times a potential hazard if the intersecting highway is being approached at an excessive speed.

Our views as hereinbefore set forth are reinforced by a consideration of the language found in subdivision "d" of section 113, supra. Prior to the addition of this subdivision by the Legislature in 1931 (St. 1931, p. 2120), in all civil cases a speed in excess, say, of 45 miles per hour was held negligence per se; that is, negligence as a matter of law. Such is no longer the case. It is now a question of fact to be determined like any other fact, as to whether the alleged speed does or does not constitute negligent driving, and the burden of proving negligence is placed upon the party making the allegation.

Again, subdivision "a," supra, calls for further elucidation. The seven different speeds set forth in the section are all made subject to the provisions of subdivision "a." Irrespective of the opinion of the Legislature as expressed in subdivision "b," that ordinarily the designated speeds would not constitute a violation of any of the provisions of subdivision "a," supra, there are many instances which may be cited which would not conform with the prohibitory provisions set forth therein. It need hardly be said that driving at 45 miles per hour on an open highway, on a foggy morning when the driver's vision is obstructed so that he cannot perceive objects which may be only a few rods away, would constitute endangering life, limb, and property, and also would be in absolute disregard of the rights of others intended to be safeguarded by the provisions of subdivision "a," supra; likewise, driving at 45 miles per hour when one is blinded by the sun or other glaring lights. To support this statement we have only to cite the case of *Havens v. Loebel*, 103 Cal. App. 209, 284 P. 676.

The changing provisions by the Legislature relative to vehicular traffic which we have cited leads us to the conclusion that the Legislature has had in mind the hardships

relating to a maximum speed, and the dangers of unlimited speed, the changed conditions of the highway, the vast improvements made in the construction thereof, and likewise the continued improvements made in automobiles and the added control now given to the driver of a motor vehicle which did not exist in the early history of the motor vehicle industry has necessitated the adoption of what we may call a "middle of the road" rule; that is, the Legislature has not adopted, under all conditions, a maximum speed limit, nor has it, considering the hazards which would be presented, done away with the speed limit, but has, by its various enactments, provided for a method of safeguarding the highway just as we have set forth herein. Thus, in all cases where a driver exceeds any one of the particular seven specifications set forth in subdivision "b" of section 113, supra, the burden is cast upon him to show that he has not violated any of the prohibitory provisions of subdivision "a," section 113, supra. If he cannot do so, following the prima facie effect given to the testimony by subdivision "c" of the section, conviction should follow.

We are satisfied from a consideration of section 113, supra, that all of the seven provisions set forth in subdivision "b" of the section, stand upon the same footing, are subject to the provisions found in subdivision "a," and also controlled by the language found in subdivision "c," supra.

[2] As stated in the beginning of this opinion, the question of jurisdiction of the justice of the peace of the third township in the county of Madera before this proceeding was had need not be determined, we think it necessarily follows from what we have said that the mere charging of one with speeding does not accuse one of any crime, and a plea of guilty thereto is of course a nullity. Without setting forth what we think would constitute a sufficiently formal complaint, the complaint must allege a violation of some one of the provisions of subdivision "a" of section 113, supra. The complaint in this action does not do so.

The writ is granted. The person in behalf of whom the petition was filed is discharged and his bail exonerated.

We concur: PULLEN, P. J.; THOMPSON, J.

**PEOPLE v. ONE HARLEY-DAVIDSON
MOTORCYCLE, MOTOR NO.**

32VL1807. *

Civ. 9779.

District Court of Appeal, First District,
Division 2, California.

May 10, 1935.

Rehearing Denied June 8, 1935.

Hearing Granted by Supreme Court
July 8, 1935.

1. Forfeitures ☞5

What will amount to reasonable investigation of buyer's responsibility, character, and reputation, exempting conditional seller from forfeiture of motor vehicle used in illegal transportation of drugs, is fact question (St. 1933, p. 788, § 15).

2. Forfeitures ☞5

Evidence held to justify finding that conditional seller of motorcycle used in illegal transportation of drugs made reasonable investigation of buyer's responsibility, character, and reputation, so as to exempt seller from consequences of forfeiture (St. 1933, p. 788, § 15).

Sale was made to Chinese residing in "Chinatown" in San Francisco. Seller required buyer to execute ordinary conditional sales contract on which were inserted names of three apparently reputable Chinese business men and their addresses, among whom was one claimed by buyer to be his employer. Before accepting contract seller caused his assistant to go to employer and verify fact of employment.

3. Forfeitures ☞5

Conditional seller, to avoid forfeiture of motor vehicle used in illegal transportation of drugs, was not required to make investigation in reference to buyer's moral responsibility, character, and reputation (St. 1933, p. 788, § 15).

4. Forfeitures ☞10

Ordering motorcycle seized in illegal transportation of drugs returned to conditional seller, instead of ordering it sold, held not error, where sales price was \$224.45, and \$50 was paid down, though exact value was not testified to, since court could consider general knowledge as to value (St. 1933, p. 788, § 15).

5. Evidence ☞601(4)

Trial ☞311

Expert evidence regarding value of articles in general use is not necessary, but jury may consider its general knowledge on subject.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 970.

Appeal from Superior Court, City and County of San Francisco; Hon. John J. Van Nostrand, Judge.

Proceeding by the People against One Harley-Davidson Motorcycle, Motor Number 32VL1807. From an adverse judgment, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

John O'Donnell, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from a judgment rendered in a proceeding commenced under section 15 of St. 1929, p. 388, as amended by chapter 253, p. 788, Statutes of 1933. A notice was filed with the county clerk of the city and county of San Francisco, July 19, 1934. Dudley Perkins filed an answer August 6, 1934. In that answer, among other things, he alleged that he was the conditional vendor of the motorcycle, as shown by a conditional sales contract, a copy of which he pleaded. Continuing he alleged that said contract was made in good faith after he had made a reasonable investigation of the responsibility, character and reputation of George Lee, the vendee named in said contract. He further alleged that said contract was made without any knowledge that the motor vehicle was to be used in the illegal transportation of any of the drugs named in section 1 of the statute. Having laid the foundation for the proof of the foregoing facts, Dudley Perkins alleged that the balance due him under his contract was equal to and in excess of the value of the motorcycle. The trial court rendered a judgment in favor of the defendant. As no findings are contained in the record we presume, in support of the judgment, that findings were waived. We must also presume that the court found all issues against the plaintiff. The plaintiff has appealed from the entire judgment. At this time the plaintiff contends that the evidence was insufficient to support the judgment. In that connection the plaintiff contends the evidence introduced at the trial did not show that before entering into the sales contract Dudley Perkins made a reasonable investigation of the responsibility, character, and reputation of George Lee. We think the point may not be sustained.

[1,2] While the showing made by the claimant Dudley Perkins was not very con-

vincing, we cannot say as a matter of law it was insufficient. As to what, in any given case, will amount to a reasonable investigation depends on the facts of that particular case. Such facts are addressed, in the first instance, to the trier of the facts. In the instant case they were addressed to the trial court. By its judgment it has made the implied finding that Dudley Perkins did make a reasonable investigation of the responsibility, character and reputation of his vendee. Unless we are prepared to say as a matter of law that such finding was an abuse of discretion we may not disturb the judgment. We are not at all inclined to state that in the instant case there was an abuse of discretion. The sale under attack covered a secondhand motorcycle of comparatively small value. The sale was made to a Chinese lad residing in "Chinatown" in San Francisco. The vendor required the vendee to execute the ordinary conditional sales contract on which were inserted the names of three apparently reputable Chinese business men and their addresses. Among them was one claimed by the vendee to be his employer. Before accepting the contract the vendor caused his assistant to go to the employer and verify the fact of the employment. Having done so the conditional sales contract was then executed. It is safe to say that many similar sales are made without the exercise of an equally reasonable degree of care.

[3] The plaintiff contends: "That it was the intention of the legislature to require the investigation to be in reference to the purchaser's *moral* responsibility, character, and reputation is clearly shown by the type of statute in which the forfeiture provisions are contained." (Plaintiff's italics.) The error in this contention rests in the confusion of two classes: (1) Vendors of narcotics, and (2) vendors of motor vehicles. The statute in its title and in all of its parts regulates the first class. It does not and, under article 4, section 24, of the Constitution, it could not also purport to regulate the second class.

[4,5] It is again asserted that the trial court erred in ordering the motor vehicle returned to the conditional vendor instead of ordering the motor vehicle sold. In other words, it is claimed that the evidence was insufficient to support the return order. The evidence on the subject we think was entirely sufficient. The sales price was \$224.-45. Fifty dollars was paid down. The exact value of the machine was not testified to

by anybody. It was a secondhand motorcycle. At times expert evidence is introduced to supplement the general information of the jury regarding values. Regarding those articles in general use that expert evidence is not absolutely necessary. The jury may take into consideration its general knowledge on the subject. In the instant case, although no jury was present, we think the trial court, sitting without a jury, was at liberty to follow the same practice. *Cederberg v. Robison*, 100 Cal. 93, 96, 97, 34 P. 625; *Jones on Ev.*, §§ 363 and 387; 22 C. J. 573 and 585.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



6 Cal.App.2d 661

HALE v. HALE,

Civ. 5337.

District Court of Appeal, Third District,
California.

May 8, 1935.

1. Divorce ⇨263, 311

Court has authority upon *ex parte* application to order issuance of execution on judgment for alimony and maintenance of children, but defendant for good cause may on motion have order vacated and execution recalled.

2. Divorce ⇨263, 286, 311, 312

Issuance of execution on judgment for alimony and maintenance of children is within discretion of trial court, whose ruling will not be disturbed in absence of abuse of discretion.

3. Appeal and error ⇨946

"Abuse of discretion" exists within rule relating to reversal of discretionary orders for abuse of discretion when it plainly appears that action of trial court effects an injustice.

[Ed. Note.—For other definitions of "Abuse of Discretion," see Words & Phrases.]

4. Divorce ⇨286, 312

Party appealing from order denying motion to vacate order directing execution to is-

sue on judgment for alimony and maintenance of children must show that in equity and good conscience he should not be compelled to pay amount fixed in execution.

5. Divorce ⇨247, 310

Duty of former husband under judgment for alimony and maintenance of children *held* to have terminated, as regards former wife, upon her remarriage, and, as regards each child, upon attainment of majority.

6. Divorce ⇨247, 310

Where execution on judgment for alimony and maintenance of children was sought by former wife after her remarriage, presumption was that after remarriage she had been supported by her second husband.

7. Divorce ⇨263, 311

Where granting of execution on judgment for alimony and maintenance of children was in discretion of trial court, former wife had remarried, and all the children had attained majority, former wife applying for execution *held* not entitled to full amount set forth in decree though defendant had not asked for modification thereof and had been absent from the state for a considerable period.

8. Divorce ⇨263, 311

Where execution on judgment for alimony and maintenance of children was asked by former wife long after her remarriage and attainment of majority by all the children, court would not attempt to apportion amount due during minority of only one child after such remarriage, but would award execution for amount due upon date of former wife's remarriage.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Ada Hale against Nathan Hale. From an order denying defendant's motion to vacate order directing execution to issue, defendant appeals.

Reversed and remanded, with directions.

Howe, Hibbett & Johnston, of Sacramento, and Lucas F. Smith, of Los Angeles, for appellant.

J. R. Wilder and J. Widoff, both of Los Angeles, for respondent.

COATS, Justice pro tem., delivered the opinion of the court.

The plaintiff and defendant were husband and wife and were divorced by a final decree of divorce on April 2, 1918. The interlocutory decree was made and entered on

March 20, 1917. By these decrees the plaintiff was awarded the custody of the minor children of the marriage, namely, Ezli Hale, hereinafter referred to as Robert Hale, Grace Hale, and Earl Hale; and defendant was ordered to pay to plaintiff for the support of herself and said children the sum of \$45 per month.

On December 6, 1932, plaintiff presented to the court an affidavit for the purpose of procuring a writ of execution. She states in this affidavit that she has remarried and there is unpaid upon the decree the sum of \$5,735. Upon this affidavit the court made an ex parte order directing execution to issue. Defendant then moved to vacate said order and to recall the execution, and from the order denying his motion, defendant appeals.

The delinquent payments on which the execution is based covers the years 1921 to 1932, inclusively. On August 18, 1926, plaintiff remarried and is now living with her present husband. The children became of age on the following dates: Robert in January, 1926; Grace in June, 1926; and Earl in August, 1932. Grace was married in the month of June, 1926, but about three weeks after the marriage separated from her husband and has since lived with her mother.

[1] The court has authority upon ex parte application to order the issuance of the execution on a judgment for alimony and support and maintenance of children. Defendant, if he has good cause to show against the issuance of the execution, has his remedy by motion to vacate the order and recall the execution. *Parker v. Parker*, 203 Cal. 787, 266 P. 283.

[2-4] The issuance of the execution is within the discretion of the court, and its order will not be disturbed unless there has been an abuse of that discretion. An abuse of discretion exists when it plainly appears that the action of the trial court effects an injustice (*Clavey v. Lord*, 87 Cal. 413, 25 P. 493), and the defendant is not entitled to relief in the present case, unless it appears that in equity and good conscience, he should not be compelled to pay the amount fixed in the execution. *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330.

[5, 6] The plaintiff's duty to support his wife terminated with her marriage. His duty towards his children is to support them during their minority and as each child attains majority this duty terminates. Trem-

per v. Tremper, 39 Cal. App. 62, 177 P. 868. Since plaintiff's remarriage she has been presumptively supported by her present husband (*Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520) and no attempt has been made by plaintiff to overthrow this presumption.

[7] In August, 1932, the youngest child became of age, and thereupon the entire duty of defendant based on the decree ceased. In the year 1926 plaintiff remarried and within two years thereafter the two elder children had become of age. Approximately \$3,200 of the sum of \$5,735 for which the execution was issued is for payments accruing after the remarriage of plaintiff. While it is true that defendant should have applied for a modification of the decree, as the decree does not specify separate amounts for the wife and each child, it is also true that, when under ordinary circumstances the duty of defendant to support plaintiff and two of the children had ceased, plaintiff was not in equity and good conscience entitled thereafter to the full amount set forth in the decree, nor to the issuance of execution therefor when the granting of the writ lies within the discretion of the court. To require defendant to be answerable for this full amount palpably effects an injustice. Plaintiff excuses her delay in applying for the writ by alleging that for a considerable period defendant was absent from the state of California. These allegations may be sufficient to justify such delay, but they do not justify what, in effect, is a revived judgment for a sum grossly in excess of that which the defendant should reasonably be compelled to pay.

[8] Defendant in this proceeding has appealed to the court to relieve him from an unjust order, and presumably would have made no objection to the order, had it and the execution based thereon been for the amount which clearly appears as a just obligation, which he should unquestionably pay. There is no doubt that during the minority of his children and while the plaintiff was unmarried, he should have complied with the judgment of the court. The aid of this court should not now be extended to him so that he may avoid this just obligation. To determine what portions of the entire amount during the later years after the remarriage of plaintiff should be allowed for the support of Earl who attained his majority in August, 1932, would be to indulge in speculation and guess, and such determination is clearly not the province either of this

court or of the trial court. *Parker v. Parker*, supra. It appears, however, that at the date of the remarriage of plaintiff, there was then due upon the judgment the sum of \$2,530. No good reason appears why defendant should not be compelled to pay this amount.

The proceedings are remanded to the lower court, with directions to the court that it amend its order directing execution to issue and the execution itself so that the same will be for the total sum of \$2,530, and that any property that may have been levied upon remain subject to the lien of such execution.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 528

GUNSUL v. RAY et al.

Civ. 10085.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Libel and slander ☞16

False and unprivileged publication by writing or printing which exposes a person to hatred, contempt, or obloquy, or which has a tendency to injure him in his occupation, is libelous.

2. Libel and slander ☞6(1)

Publication, to be libelous, need not charge commission of a crime.

3. Libel and slander ☞10(3)

Statements in notice for recall election that plaintiff, as city auditor, had been taking from city more money per year than she was entitled to, and that she had caused the issuance of a city warrant for payment of personal services rendered by attorney to her, were libelous, if false, unless privileged.

4. Libel and slander ☞36, 45(1).

Statement in notice for recall election alleging that plaintiff, as city auditor, had been taking more money from city than she was entitled to, and had caused the issuance of a city warrant for payment of personal services rendered by attorney to her, held not absolutely privileged as a statement made in a legislative, judicial, or official proceeding, but qualifiedly privileged as a communication made without malice to a person inter-

ested therein by one who is also interested (Civ. Code § 47, subds. 2, 3).

"Official proceeding" is defined as a term denoting action taken by an officer; "official" as of or pertaining to an office, position, or trust; connected with holding an office; and "official act" as any act done by officer in his official capacity under color and by virtue of his office.

[Ed. Note.—For other definitions of "Official," "Official Act" and "Official Proceeding," see Words & Phrases.]

5. Libel and slander ☞83

Complaint by city auditor for statement in notice for recall election that she had been drawing from city more money than she was entitled to, and had caused to be issued a city warrant in payment for personal services rendered by attorney to her, held to sufficiently allege malice (Civ. Code § 47, subd. 3).

6. Libel and slander ☞80

Complaint in action by city auditor for statement in notice for recall election that she had been drawing more money from city than she was entitled to, and had caused to be issued a city warrant for payment of personal services rendered by attorney to her, held to state a cause of action (Civ. Code § 47, subd. 2).

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Myrtelle L. Gunsul against Frederick Ray, Jr., and others. From judgment for defendants after an order sustaining a general demurrer to the complaint without leave to amend, plaintiff appeals.

Reversed, with directions.

Calvin E. Woodside and Hunsaker, Moote & Longcroft, all of Los Angeles, for appellant.

Archie L. Tower and Louis N. Whealton, both of Long Beach, for 22 respondents.

M. E. Lewis, Jr., of Long Beach, for respondent A. B. Wood.

CRAIL, Justice.

This is an appeal from a judgment in favor of the defendant after an order had been made sustaining a general demurrer to the complaint without leave to amend. The only questions involved on this appeal are: Was the language used by the defendant libelous? Was it privileged? If the privilege was qualified privilege, was malice properly alleged in the complaint in order to remove the privilege? If so, the

complaint stated a cause of action and the demurrer should have been overruled.

As regards these matters, the complaint alleged that the defendants, through evil motive and malice toward the plaintiff, willfully, maliciously, and with intent and design to injure, disgrace, and defame the plaintiff, and to bring her into public discredit as an auditor and as a woman, and to cause the public to hold the said plaintiff in contempt and ridicule, did sign a statement addressed to the city clerk of Long Beach, a notice given to the qualified electors of said city containing the following statements: "Whereas, for years the City Auditor has been taking from the City of Long Beach, \$600.00 more per year than she is entitled to, in direct violation of the Charter of the City of Long Beach, Section 55-A. Whereas, the City Auditor (Miss Gunsul) has violated the City Charter, Sections 136 (2) and 136 (4) by causing the issuance of a warrant for a considerable sum, to a certain prominent Los Angeles Attorney, drawn on the general payroll funds of the City of Long Beach, as payment for his services in defending her in a personal suit, after a demand by said attorney had been turned down by our own City Council, and which our own City Attorney labeled as a personal action, and in which suit as City Attorney, he declared he could not properly defend her." That said statements were not only false, but were known by defendants to be false, and were made through malice toward the plaintiff and with the intent of injuring plaintiff, as heretofore set out.

[1-3] A false and unprivileged publication by writing or printing which exposes a person to hatred, contempt, or obloquy, or which has a tendency to injure him in his occupation, is libelous. To charge a public official with the misappropriation of public funds is an attack upon his or her honesty and fitness for public service. It is not necessary, in order to be libelous, that a publication charge the commission of a crime. It is obvious that the statements herein complained of tended to expose the plaintiff to contempt and obloquy and to injure her in her occupation as a public officer, and were libelous, if false, unless privileged.

[4] The defendant contends that the statement was absolutely privileged under subdivision 2 of section 47 of the Civil Code, which reads; "In any (1) legislative

45 P.(2d)—16½

or (2) judicial proceeding, or (3) in any other official proceeding authorized by law," or if not so privileged, at least qualifiedly privileged under subdivision 3 of said section, which reads, "In a communication, without malice, to a person interested therein * * * by one who is also interested." Obviously the publication was not had in a legislative or judicial proceeding. A proceeding for a recall is political in its nature, and the issue is of the latter character. *Abbey v. Green*, 28 Ariz. 53, 235 P. 150; *Conn v. City Council of Richmond*, 17 Cal. App. 705, 121 P. 714, 719; *Cudihee v. Phelps*, 76 Wash. 314, 136 P. 367. Neither is a recall proceeding an official proceeding. An "official proceeding" is defined in 46 Corpus Juris, 1085, as "a term denoting action taken by an officer." See, also, *Layne v. Kirby* (Cal. App.) 278 P. 1046. Webster's Dictionary defines official: "Of or pertaining to an office, position or trust; connected with the holding of office." "Official act" is defined as "any act done by the officer in his official capacity under color and by virtue of his office." 46 Cor. Jur. 1084.

[5] We agree that the publication was qualifiedly privileged under said subdivision 3 in the same way that publications made in connection with other elections are privileged. Such publications, if false, must be "without malice," and the complaint herein would not be good unless it contained a proper allegation of malice. The complaint does sufficiently allege malice. 16 Cal. Jur. 85, and cases cited.

[6] The defendant contends that "When the facts clearly constitute a privileged communication, even though the language employed under other circumstances might be slanderous per se, the very privilege creates a presumption that the communication is used innocently and without malice," citing numerous cases and texts. But we are considering the pleadings, not the evidence. Malice may be alleged and was alleged. We recognize no rule of public policy which would give to a citizen actuated by malice a greater immunity from suits for libel in cases arising out of recall elections than in cases arising out of ordinary elections. The complaint states a cause of action.

Judgment reversed, with directions to overrule the demurrer.

I concur: STEPHENS, P. J.

In re HELM'S ESTATE.

Civ. 9805.

District Court of Appeal, First District,
Division 2, California.

May 15, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Courts ☞200½

Probate court had jurisdiction of controversy between coexecutors, husband, and son of testatrix, as to whether property devised was community property, where coexecutor-husband claimed property in his individual capacity on settlement of coexecutors' final accounts, although probate court found that property was community property and estate, therefore, had no assets.

2. Executors and administrators ☞11

Probate court's jurisdiction over estate is not dependent upon ultimate determination of existence of assets of estate, but is ordinarily invoked by *prima facie* showing as to existence of assets.

3. Executors and administrators ☞11

Fact that property disposed of by will stood of record in testatrix' name *held* sufficient *prima facie* showing as to existence of assets and fair probability of right to give probate court jurisdiction to grant letters testamentary.

4. Husband and wife ☞264

Evidence that testatrix and husband had agreed that all their property should be community property supported finding that property was community property, over portion of which acquired prior to July 16, 1923, testatrix had no power of testamentary disposition, and over subsequently-acquired portion of which testatrix had power of testamentary disposition to extent provided in statutory amendment (Civ. Code, § 1401).

5. Wills ☞558(1)

Where will executed September 13, 1923, disposed of parcels of property described therein as testatrix' separate property, which property was all community property acquired prior to July 16, 1923, and devised residue of "said" property to son, husband, not son, was entitled to testatrix' interest in community property acquired after July 16, 1923, not described in will, since "said," which relates only to that which is before mentioned, referred solely to property described, and testatrix died intestate as to other property (Civ. Code, § 1401).

[Ed. Note.—For other definitions of "Said," see Words & Phrases.]

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Emilie A. Helm, also known as Emilie Anna Helm, also known as Emilia Helm, also known as Mrs. Emilie A. Helm, and also known as Emilia A. Helm, deceased. From a judgment on exceptions of Oscar C. Helm to the account and petition of Charles Helm, executor, and on exceptions of Charles Helm to account and petition of Oscar C. Helm, coexecutor, Oscar C. Helm appeals.

Affirmed.

Marshall Rutherford, of Oakland, and George D. Collins, Jr., of San Francisco, for appellant.

Nathan Harry Miller, of Oakland, for respondent.

SPENCE, Justice.

This is an appeal from the judgment of the probate court wherein said court adjudged all of the property in question to be the community property of the decedent, Emilie A. Helm, and her husband, Charles Helm, the respondent herein, and further adjudged that said respondent was entitled thereto as the survivor of the marital community.

Decedent executed her last will and testament on September 13, 1923. In said instrument respondent Charles Helm, her husband, and appellant Oscar C. Helm, her son, were named as executors. Decedent first declared in said will that all of the property described therein was her separate property and that "None of the property which I describe hereafter represents any community interest therein with my said husband." Decedent thereupon specifically described in her will all of the property in controversy acquired prior to the execution of said will. Then after making certain bequests and devises to the respondent husband, a clause provided that in the event her husband established a "community interest in and to any of my property as designated herein," the provisions for bequests and devises to her said husband should be void. Then followed a provision in favor of appellant as follows: "I give, bequeath and devise all the rest, residue and remainder of my *said* property to my son Oscar C. Helm." (*Italics ours.*)

After the death of decedent in 1931, respondent and appellant jointly applied for letters testamentary, which letters were granted. The controversy regarding the nature of the property then arose. Re-

spondent filed an inventory wherein he returned all of the property as community property. Appellant also filed an inventory wherein he returned all of the property as the separate property of the decedent. Respondent later filed his first and final account and petition to declare the property to be the community property of decedent and respondent. Appellant filed his exceptions to said account and petition. Appellant also filed his own account and petition for distribution, to which respondent filed his objections. Both of said accounts and petitions and all pleadings filed by the parties came on for hearing. Said accounts were settled, and thereafter the court entered the judgment from which this appeal is taken. The court found and declared by said judgment that all of the property in controversy was community property, and that upon the death of decedent in 1931, all of the community property acquired prior to July 16, 1923 (the effective date of the 1923 amendment to section 1401 of the Civil Code (St. 1923, p. 29) now section 201 of the Probate Code), vested in and became the property of the respondent husband. It was further decreed that decedent died intestate as to her community interest in the property acquired subsequent to July 16, 1923, and that upon the death of decedent, title thereto vested in the respondent husband by reason of such intestacy.

[1-3] We will state appellant's first contention in his own words as follows: "No jurisdiction to adjudicate in a probate proceeding an adverse claim of title to property the court adjudges is no part of the estate." We find no merit in this contention. The authorities sustaining the general rule that the probate court has no jurisdiction to try title where the property is claimed adversely by a stranger to the probate proceedings have no application. Here the husband was one of the executors and claimed the property in his individual capacity. The general rule and the exception are clearly pointed out in *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820. The court there said, 201 Cal. 267, at page 271, 256 P. 820, 821: "It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative." See, also, *In re Estate of Kelsch*, 203 Cal. 613, 265 P. 214; *In re Estate of Roach*, 208 Cal. 394,

281 P. 607; *In re Estate of Fulton*, 188 Cal. 489, 205 P. 681; *In re Estate of Vucinich* (Cal. App.) 37 P.(2d) 175; *In re Estate of Escolle*, 134 Cal. App. 473, 25 P.(2d) 860; *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512; *In re Estate of Bruck*, 140 Cal. App. 300, 35 P.(2d) 431. Appellant apparently concedes that there is an exception to the general rule, but seems to take the position that the probate court is vested with jurisdiction only for the purpose of adjudging the representative's claim to be invalid, and of charging him with the property in the accounting and is without jurisdiction to determine the claim in favor of the representative in his individual capacity. It is sufficient to state that appellant cites no authorities in support of his position, and that the authorities above cited make no such distinction. Under the heading, appellant also argues that as the adverse claim was adjudicated in favor of respondent, the probate court had no jurisdiction, as "there can be no jurisdiction in probate if there is no property of the decedent." We are of the opinion that this argument is also untenable. The jurisdiction of the probate court is not dependent upon the ultimate determination of the existence of assets. The necessary jurisdictional showing is made at the time of the application for letters, and only a prima facie showing regarding assets need ordinarily be made. In 11a California Jurisprudence, page 112, it is said: "It has been doubted that the existence of assets is jurisdictional; at least the amount and value are not, and a fair probability of right which may or may not prove to be of value or validity seems to be enough." Here the property stood of record in the name of decedent. This fact alone made a prima facie showing of assets and showed at least a "fair probability of right." Upon this showing the probate court granted letters, and it had jurisdiction to do so. As was said in *Re Estate of Daughaday*, 168 Cal. 63, at the bottom of page 71, 141 P. 929, 932: "So it may be said that the probate court will always grant such letters where administration is either necessary or advisable or desirable." We therefore conclude that the probate court had jurisdiction to issue letters and to proceed with the administration, and the mere fact that the adverse claim was thereafter resolved in favor of said executor in his individual capacity did not serve to deprive the probate court of such jurisdiction.

[4] Appellant further contends that "the property in dispute is separate property of decedent and not community property." We assume that appellant means to challenge the sufficiency of the evidence to support the findings to the contrary. A reading of the record, however, shows the existence of ample testimony for this purpose. We deem it unnecessary to set forth this evidence in detail, but it may be briefly summarized. Respondent and decedent were married in 1894 and moved to California shortly thereafter. At that time they were apparently without funds or property of their own, as they borrowed money and lost the same in a business venture. Commencing in 1899, and for many years thereafter, respondent worked in a butcher shop where he received his wages and the meat for his household. The parties were apparently thrifty, and as early as 1902 they started acquiring real estate and improving it. Respondent had a water tank on the property and derived an income of \$35 per month for seventeen years from the water business which he conducted. Respondent also derived an income from rents. During all of the years of their married life, decedent acted as the bookkeeper and treasurer for the funds of the spouses, and respondent turned over to decedent all moneys received by him from his employer and from other sources. The bank account was placed in decedent's name, and, when real estate was acquired, the property was placed in decedent's name. Each of the spouses received a small inheritance subsequent to the marriage, and the money thus received was also used in the purchase and improvement of real estate. Aside from the inheritance of \$4,400 from her father, decedent contributed no other money to the purchase of any of the property, and had no independent income of her own. The money received from the various sources mentioned was commingled together and the spouses acquired and improved numerous pieces of real property therewith, nine parcels of which remained in the name of decedent at the time of her death. This property was referred to by the spouses as "our property," and decedent agreed with respondent that it "belongs to us." She told friends that all of the property was community property, and that she and respondent were "pals in everything." She always told respondent that all of the money and property they had "would be for our old age." Respondent testified that he had absolute con-

fidence in decedent, and therefore permitted her to keep the money and property in her name, but that he never intended thereby to make her a gift of any of said money or property.

From the foregoing summary of some of the testimony introduced, it is apparent that the court could properly conclude that regardless of the various sources from which the funds were obtained and regardless of the fact that said funds and the real property purchased therewith were placed in the name of decedent, the spouses had agreed that all of said funds and all of said property should be community property. Under these circumstances, the finding that all of said property was community property may not be disturbed. *Kenney v. Kenney*, 220 Cal. 134, 30 P.(2d) 398; *In re Estate of Kelsch*, 203 Cal. 613, 265 P. 214; *Durrell v. Bacon*, 138 Cal. App. 396, 32 P.(2d) 644; *In re Estate of Sill*, 121 Cal. App. 202, 9 P.(2d) 243; *In re Estate of Wahlefeld*, 105 Cal. App. 770, 288 P. 870; *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640.

It appears to be conceded by appellant that if the property was community property, decedent had no power of testamentary disposition over the portion thereof acquired prior to July 16, 1923. *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519. On the other hand, respondent concedes that decedent had the power of testamentary disposition to the extent provided in the 1923 amendment to section 1401 of the Civil Code (now section 201 of the Probate Code) over any portion of the community property that may have been acquired after July 16, 1923. The court decreed that decedent died intestate as to the last-mentioned portion of the community property.

[5] Appellant contends that there was error in the last-mentioned ruling claiming that the "residuary clause" in the will made such intestacy impossible. We are of the opinion, however, that a reading of the will, including the so-called "residuary clause," shows that appellant's contention is without merit. Decedent specifically described certain property in her will, and claimed that it was her separate property. Then, after disposing of certain parcels thereof, she gave the residue of her "said property" to appellant. The word "said" has a definite and well-understood meaning. It relates only to that which is "before mentioned." Webster's New International Dictionary; Bouvier's Law Dictionary;

Black's Law Dictionary; 24 Am. & Eng. Ency. of Law (2d Ed.) p. 1014; **Greeley Nat. Bank v. Wolf** (C. C. A.) 4 F.(2d) 67, 69; **Commonwealth v. Schweiters**, 122 Ky. 874, 93 S. W. 592, 594. The so-called "residuary clause," above set forth, clearly related only to the residue of property specifically described in the will, and, being free from ambiguity, it cannot be construed into a general residuary clause so as to cover after-acquired property not described in the will. **Blankenbaker v. Early**, 132 Va. 408, 112 S. E. 599; **Noel v. Jones**, 185 Ky. 835, 216 S. W. 98; **In re Alabone's Estate**, 75 N. J. Eq. 527, 72 A. 427; **Wheeler v. Brewster**, 68 Conn. 177, 36 A. 32; **Allison v. Hitchcock**, 309 Mo. 488, 274 S. W. 798; **Thompson on Construction of Wills**, pp. 463, 469, 470.

Judgment is affirmed.

We concur: **NOURSE, P. J.**; **STURTEVANT, J.**



6 Cal.App.2d 682

MERCHANTS' HOLDING CORPORATION,
Limited, v. **GREY et al.**
Civ. 5273.

District Court of Appeal, Third District,
California.
May 11, 1935.

Hearing Denied by Supreme Court
July 8, 1935.

1. Mortgages ⇐280(3)

Formal promise by purchaser to assume mortgage debt is unnecessary to render purchaser personally liable, since obligation to pay mortgage debt may exist by virtue of oral agreement, or separate instrument, or be implied from circumstances.

2. Mortgages ⇐280(2)

Grantee who with knowledge of contents accepts conveyance requiring him to assume payment of existing mortgage becomes personally liable therefor.

3. Mortgages ⇐280(5)

Delivery of deed to agent acting within scope of authority and with knowledge of assumption clause therein, retention of deed for several months, recording of it, and subsequent conveyance of the property, held to support finding that deed requiring grantee

to pay mortgage debt was accepted by grantee.

4. Principal and agent ⇐137(2)

Purchaser, who by word and conduct represented to vendor that third person had authority to conduct negotiations and accept delivery of documents and proposals for transmission to purchaser, held estopped to deny agent's authority.

5. Principal and agent ⇐177(3)

Where agent had authority to accept deed for delivery to purchaser and knew that it required purchaser to pay mortgage debt, his knowledge was imputed to purchaser who must bear consequences of any breach of agent's duty to inform purchaser of the fact.

6. Mortgages ⇐280(5)

In action to recover deficiency after sale under deed of trust, evidence held to show that defendant had purchased the property by assuming mortgage debt.

7. Appeal and error ⇐1008(1)

Whether deed absolute on its face is a mortgage depends upon parties' intention, which is question of fact for trial court.

8. Mortgages ⇐36

Presumption is that deed absolute on its face is what it purports to be, and one seeking to overcome presumption has burden of producing clear and convincing proof.

Appeal from Superior Court, Los Angeles County; **R. M. Rankin**, Judge.

Action by the Merchants' Holding Corporation, Limited, against **Lina Elise Grey** and others. From a judgment for plaintiff the named defendant appeals.

Affirmed.

Stick & Moerdyke, of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondent.

PAULSEN, Justice pro tem.

Defendant Grey appeals from a judgment rendered against her and **Henry Ramey** in an action to recover a deficiency after sale under a deed of trust.

Prior to August 20, 1929, **Mrs. O. A. Ramey**, the mother of **Henry Ramey**, owned two contiguous lots in Altadena described as lots 11 and 12 of tract 1627. An expensive, reinforced concrete house had been constructed on each lot, and on each house and lot was an encumbrance for \$20,000.

The two lots were somewhat small for large houses, and in order to make their property conform to the standards desired in the locality and also to secure some relief from the burden of debt, the Rameys conceived the idea of disposing of one of the houses and reserving both lots for the remaining house. In July, 1929, Henry Ramey telephoned to appellant who owned vacant lots nearby, and suggested a plan for the removal of one of the houses to one of her lots. She referred him to Edwin G. Bowen "as her agent and representative who had charge of her property." After extended negotiations with Bowen, an agreement was reached, according to Ramey, by which the house on lot 11 was to be removed to appellant's lot, and Ramey was then to obtain a new loan for \$20,000 secured by a trust deed thereto to replace the encumbrances theretofore on the house and said lot 11. After this was done, Ramey was to reconvey the house and lot to appellant who was to assume payment of the indebtedness. She was then to give Ramey an option to repurchase for \$40,000.

In furtherance of this plan, Ramey and Downen called at appellant's home. Ramey did not see her at that time, but she conferred with Bowen in a separate room where she prepared and signed a deed from herself to Ramey, and also filled out in her own handwriting a deed form for the reconveyance from Ramey and his wife. After writing in the description she drew a diagonal line through the remaining blank space of the form. When an acknowledgment certificate had been attached to appellant's deed, the two papers were handed by Bowen to Ramey. Ramey thereafter obtained a new loan for \$20,000 secured by a trust deed on this property. He then had his wife sign the form prepared by appellant and took it to Bowen's office. Before he signed it himself he called Bowen's attention to the fact that appellant had "forgotten" to include an assumption clause in the form and thereupon, in Bowen's presence, he erased a part of the diagonal line drawn by appellant and inserted, immediately after the description, the following words: "Subject to trust deed in amount Twenty thousand Dollars (\$20,000.00) which grantee assumes and agrees to pay." He then signed and acknowledged it and delivered it to Bowen, who placed it in his safe. An option to repurchase was then given to Ramey. The deed was delivered to Bowen on August 20, 1929, and remained

either in the hands of Bowen or appellant until January 13, 1930, when appellant had it recorded. On January 15, 1930, appellant conveyed the property to Edwin G. Bowen Company. On November 6, 1930, the then holder of the note wrote appellant requesting payment, but she denied any knowledge of the existence of the assumption clause, and attempted to repudiate the whole transaction. By the terms of the note, no interest or principal had become payable prior to this time, and nothing had been paid by either Ramey or appellant.

Appellant disputes some of the facts stated above, but they are all established by abundant evidence, and, notwithstanding the conflict, the trial court accepted them as true.

[1] Appellant insists that she had no intention of assuming the debt and that she never promised to pay it. A formal promise was not necessary to render her personally liable. Such an "obligation may be made orally or in a separate instrument; it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement." *Hopkins v. Warner*, 109 Cal. 133, 41 P. 868, 869; *Dutton v. Locke-Paddon*, 37 Cal. App. 693, 174 P. 674; *Lick v. Anderson*, 29 Cal. App. 491, 156 P. 70. "This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises, and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety." *Williams v. Naftzger*, 103 Cal. 438, 37 P. 411; *Hopkins v. Warner*, supra.

Appellant contends that whatever agreement may have been reached by Ramey and Bowen, the real agreement, as she accepted it, was set forth in the deed form she prepared herself, and that neither Ramey nor Bowen had authority to alter it. In her opening brief she propounds the following question: "Has a general agent, without the knowledge or consent of his principal, authority to consent to the alteration of a deed by inserting a clause therein assuming and agreeing to pay a trust deed, and by accepting the deed thus altered, to bind his principal to such assumption?"

No deed was altered by Ramey. At the time the paper was filled out by appellant it was nothing more than a blank form which the grantor could change in any manner he saw fit until the time of delivery. Dutton v. Locke-Paddon, *supra*. The document as finally delivered to Bowen was Ramey's deed, not appellant's, and until he signed and delivered it he had the right to alter it at will. Nor is there any question here as to the authority of an agent to consent to the alteration of a deed. The deed did not come into existence, as such, until delivery, and there was no alteration thereafter. Appellant argues, however, that she intended the agreement to be as set forth in the papers prepared by her, and that Bowen could not consent to the alteration of such agreement. This assumes that she alone could make an agreement. If there was no meeting of minds at this time on the question of assuming the debt, then there was no agreement at this time to be altered. Moreover, the circumstances attending the preparation of the papers by appellant and her version of the transaction were not conclusive evidence of the terms of the agreement. These were simply facts to be considered in connection with all the other facts in the case to determine what kind of an agreement, if any, had been finally reached.

[2-5] It is next contended that the contract was one coming within the statute of frauds, and that as Bowen had no written authority to consummate a contract appellant was not bound by his acts. In the view we take of the case, it is unnecessary to consider the application of the statute of frauds to the making of the preliminary agreement. Under the rule stated above, that such an obligation may be implied from the transaction of the parties or may be shown by the circumstances under which the purchase is made, the trial court evidently believed that appellant did intend originally to assume the debt as part of the consideration for the house, and that her failure to insert the assumption clause in the form was due either to an oversight or to ignorance of such procedure. However, the judgment rests upon other grounds. The court found that the deed from Ramey, with the assumption clause therein, "was delivered to the defendant, Lina Elise Grey, by delivering the same to her duly authorized agent and representative, Edwin G. Bowen, and accepted by her in the form and manner as the same had been executed." A grantee who, with knowledge of its contents, accepts a con-

veyance which requires him to assume the payment of an existing mortgage becomes personally liable therefor. Lick v. Anderson, *supra*; Daniels v. Johnson, 129 Cal. 415, 61 P. 1107, 79 Am. St. Rep. 123; Tulare County Bank v. Madden, 109 Cal. 312, 41 P. 1092. The delivery of the deed to an agent who was acting within the scope of his authority and who had knowledge of the assumption clause, the retention of the deed for many months, the recording of it, and later the conveyance of the property to a third party, afford ample support to the finding of acceptance. Even if Bowen had no authority to consummate the agreement, there was abundant evidence to prove his authority to negotiate with Ramey and to accept physical delivery of documents and proposals for transmission to appellant. Both by word and conduct appellant represented to Ramey that Bowen possessed such power, and she is now estopped to deny it. Hovley v. Frank Meline Co., 83 Cal. App. 441, 257 P. 112; Henry Cowell Co. v. Santa Cruz County Nat. Bank, 82 Cal. App. 519, 255 P. 881; Sauble v. Gary S. C. Agency, 56 Cal. App. 606, 206 P. 141; Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 P. 388. Bowen was acting strictly within the scope of his authority, he knew the contents of the deed, and it was his duty to transmit this information to appellant if she did not already have it. His knowledge became the knowledge of his principal. Shamlian v. Wells, 197 Cal. 716, 242 P. 483; Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. By recording the deed and later conveying the property, she accepted the assumption clause and rendered herself liable for the debt.

Appellant has cited a number of authorities holding that the mere recording of such a deed does not constitute acceptance, but an examination of them shows that in each case the grantee had no knowledge of the existence of such clause at the time of recordation. She relies particularly upon Proctor Trust Co. v. Neihart, 130 Kan. 698, 288 P. 574, in which the Supreme Court of Kansas held that a delivery to and recording by an agent did not bind his principal. But this case can be distinguished readily from the instant case. It was conclusively shown there that a written agreement, with no provision for assumption of the mortgage, had preceded the execution of the deed; that the clause was inserted without

the agent's knowledge and contrary to the terms of the written contract, and that he was not aware of it when he had it recorded.

The trial court found that appellant "entered into an agreement with Henry Ramey for the purchase" of the house. It is now contended that the transaction was not a sale (1) because appellant paid no purchase price; and (2) because the deed and option, under all the circumstances, constituted a mortgage.

[6] Conceding, without deciding, that such a finding was essential to support the judgment, we see no merit in these contentions. Ramey testified that the \$40,000 price to him was based upon the value of appellant's lot, which was worth between \$10,000 and \$11,000, plus the amount appellant was to pay for moving the house, that is, \$5,292, plus the sum of \$500, which she was to invest in landscaping the property, plus a commission of \$2,500 or \$2,600 to Bowen, and plus the amount of \$20,000 and interest to accrue, secured by the trust deed. It is apparent that the price of \$40,000 was about the amount appellant had paid out, added to the value of her lot. An appraiser testified that the house was worth \$22,400 on August 20, 1929. It is a fair and logical inference from these facts, when considered with the other testimony of Ramey, that appellant purchased the house for \$20,000 by assuming the indebtedness for that amount.

[7,8] Whether a deed absolute on its face is a mortgage is a question of the intention of the parties to the transaction, and the question of intention is one of fact to be determined by the trial court. The presumption is that such a deed is what it purports to be, and one who seeks to overcome such presumption has the burden of producing clear and convincing proof. *Boal v. Gassen*, 178 Cal. 132, 172 P. 588; *Peninsular, etc., Co. v. Pacific S. W. Co.*, 123 Cal. 689, 56 P. 604; *Vance v. Anderson*, 113 Cal. 532, 45 P. 816; *Pallett v. Pallett*, 123 Cal. App. 701, 11 P.(2d) 898; *Reynolds v. Hook*, 109 Cal. App. 226, 292 P. 1000; *Stevens v. Fetterman*, 76 Cal. App. 741, 246 P. 102.

Appellant quotes from *In re Cutting*, 17 Cal. App. 604, 121 P. 304, 305, as follows, "It is settled law that a sale is an agreement by which one of two contracting parties * * * gives a thing and passes title, in exchange for a certain price in current money," etc., and argues that as no

money passed to Ramey there could not have been a sale. The Supreme Court has held that the term "sale" does not necessarily mean a transfer for money only, and that the word frequently has a broader meaning. *W. F. Boardman Co. v. Petch*, 186 Cal. 476, 199 P. 1047; *Mansfield v. District, etc., Ass'n*, 154 Cal. 145, 97 P. 150. The agreement to assume and pay the debt of \$20,000 as a consideration for the house is entirely consistent with the idea of a sale.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



**MERIWETHER INV. CO., LIMITED, v.
LAMPTON, County Clerk (CITY OF
LOS ANGELES, Intervener).***
Civ. 9838.

District Court of Appeal, Second District,
Division 2, California.
April 29, 1935.

Hearing Granted by Supreme Court
June 28, 1935.

1. Constitutional Law ⇨169

Change of remedy does not impair obligation of a contract, provided there is still an adequate and available remedy.

2. Constitutional Law ⇨144

Municipal Corporations ⇨907

Statute requiring, prior to entry of decree foreclosing lien of street improvement bond, payment to city of penalties upon bond, delivery of bond to city treasurer for cancellation and delivery of certificate of cancellation to county clerk *held* not invalid as impairing bondholder's contract, since statute affected remedy only, but left its effectiveness unimpaired (St. 1933, p. 2392, § 76b).

3. Municipal corporations ⇨907

Statute requiring bondholder foreclosing lien of street improvement bond to deliver bond to city treasurer for cancellation prior to entry of judgment of foreclosure *held* not invalid on ground that cancellation destroyed obligation of bond (Civ. Code, § 1699; St. 1933, p. 2392, § 76b).

4. Statutes ⇨85(4)

Statute providing that decree of foreclosure in action to enforce lien of street improvement bond should not be entered until

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 147.

certificate of cancellation of bond should be delivered to county clerk *held* not invalid as "special legislation" in that entry of decree was not required immediately upon filing of decision in accordance with general rule, since statute applied to all actions of a class alike (Code Civ. Proc. § 664; St. 1933, p. 2392, § 76b).

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandate by the Meriwether Investment Company, Limited, against L. E. Lampton, as county clerk and ex officio clerk of the Superior Court of the State of California, in and for the County of Los Angeles, in which the City of Los Angeles intervened. From a judgment denying the writ of mandate, petitioner appeals.

Affirmed.

Roscoe R. Hess, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent Lampton.

Ray L. Chesebro, City Atty., and Arthur Loveland, Deputy City Atty., both of Los Angeles, for intervener and respondent.

CRAIL, Justice.

The validity of section 76b of the Improvement Act of 1911, as added by St. 1933, p. 2392, is attacked on this appeal. Said section became effective in August, 1933, as an amendment to said act. After it became effective, appellant brought an action to enforce the lien of a street improvement bond, issued in 1931, and obtained judgment in November, 1933. The county clerk refused to enter the decree of foreclosure until certain provisions of said section 76b had been complied with. These provisions were that the city's share of the penalties upon the bond be paid to it, that the bond be delivered to the city treasurer for cancellation, and

that a certificate of cancellation from the city treasurer be delivered to the county clerk. Thereupon the applicant sought a writ of mandate requiring the county clerk to enter the decree without regard to the requirements of section 76b. The city of Los Angeles intervened and obtained judgment denying the writ of mandate. From this judgment, the appeal is taken.

[1, 2] Appellant contends that section 76b is invalid because it impairs the obligation of the contract of the bondholder. In our opinion, section 76b affects the remedy only. A change of remedy does not impair the obligation of a contract, provided there still is an adequate and available remedy. Under section 76b the effectiveness of the remedy remains unimpaired, and the obligation of the bond is not affected.

[3] Appellant's next contention is that section 76b is invalid because it requires the cancellation of the bond prior to the entry of judgment of foreclosure. Appellant argues that this cancellation destroys the obligation of the bond. In support of this contention, appellant relies upon section 1699 of the Civil Code. But section 1699 is not applicable here unless the bond were canceled "with intent to extinguish the obligation thereof," which is not true. The clear intent of section 76b is that the obligation of the bond shall not be extinguished, but shall be kept alive in the form of a judgment which is to be entered upon the cancellation of the bond.

[4] Appellant's third and last contention is that section 76b is special legislation in that it does not require the entry of the decree immediately upon the filing of the decision, as is the general rule under section 664 of the Code of Civil Procedure. An act is not special or invalid merely because it is peculiar to the character of the action with reference to which it is prescribed. Section 76b applies to all actions of a class alike, and is valid.

The judgment is affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

6 Cal.App.2d 598

LESSING v. GIBBONS.

Civ. 9320.

District Court of Appeal, First District,
Division 2, California.

May 6, 1935.

1. Attorney and client ☞166(4)

Evidence in attorney's action to recover balance due for legal services held sufficient to sustain trial court's finding that plaintiff was discharged by defendant without cause or justification.

2. Attorney and client ☞20

Attorney's representation of both motion picture director and actress, with their knowledge and consent, in concluding negotiations for termination of their professional relationship and establishment of new relationship with another producer after substantial agreement on terms thereof by all parties thereto, held proper, in view of remote possibility of conflicting interests of clients.

3. Attorney and client ☞20

Attorney is not precluded from accepting employment by two persons merely because of possible conflict of their interests, in absence of actual or contemplated litigation.

4. Master and servant ☞41(1)

One wrongfully discharged from employment and prevented from further performing his contract may elect generally to treat contract as rescinded, sue on quantum meruit, and recover reasonable value of services performed, though exceeding contract price.

5. Attorney and client ☞134(1)

Contract of employment as attorney to render all legal advice to client, represent her in matters "now or hereafter" pending in state courts, and render all legal services reasonably required by her during four-year period for "retainer fee" of stated monthly sum and percentage of client's net earnings as actress, held entire, not divisible or apportionable, so that attorney's recovery for legal services performed was not limited by amount of payments made to him under contract before his wrongful discharge or to contract price, especially as there was no means of ascertaining contract price.

Contract did not provide for a definitely apportioned exchange of services to be performed during any one period or payment to be made during such period, but recited that attorney had already rendered and was then rendering valuable services to client and that part of consideration for contract was deferment of payment of reasonable fee and spreading payment over period of time; amount of

retainer fee depended on several contingencies under contract; and attorney was to receive additional compensation for services requiring him to leave certain city or remain away from his office therein for more than two days in any month.

Appeal from Superior Court, Los Angeles; Minor Moore, Judge.

Action by Gunther R. Lessing against Mrs. Cedric Gibbons, formerly sued as Dolores del Rio. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harold E. Thomas, of Los Angeles, for appellant.

Charles R. Nelson, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff, an attorney at law, brought this action to recover the alleged balance due for legal services performed for defendant. Upon a trial by the court, sitting without a jury, plaintiff had judgment for the sum of \$16,000, from which judgment defendant appeals.

The pleadings herein give no hint of the questions involved on this appeal. The first count alleged that plaintiff had performed legal services for defendant of the reasonable value of \$35,000. The second count alleged that plaintiff had performed legal services for defendant and that defendant had agreed to pay the sum of \$35,000 therefor. Both counts alleged the payment of the sum of \$4,000 to plaintiff on account of said services and judgment was prayed for the balance of \$31,000. The answer admitted the performance of the legal services but denied that said services were reasonably worth any sum in excess of the amount paid, to wit, \$4,000. It further denied that defendant agreed to pay plaintiff any sum in excess of \$4,000 for said services. Full payment and satisfaction of plaintiff's claims was therefore affirmatively alleged. The trial court found against the existence of an express agreement to pay for said services as alleged in the complaint, but found that the services had been performed at the request of defendant and that said services were of the reasonable value of \$20,000. No attack is made upon said findings on this appeal. The trial court made further findings in relation to the employment of plaintiff by defendant under a written agreement and

the wrongful discharge of plaintiff from said employment. It is the existence of said written agreement and discharge of the plaintiff from his employment thereunder which gives rise to the questions presented here. It is therefore necessary to set forth certain facts as a basis for a discussion of these questions.

The defendant, who was originally sued herein as Dolores del Rio and who is still known by that name in her professional work, was a native of Mexico. She was possessed of dramatic talent and was induced to come to California to seek fame in the motion picture world by Mr. Edwin Carewe, a motion picture director. She entered into a contract with Mr. Carewe in 1925 and shortly thereafter started her work in the production of photoplays. Her success was phenomenal. Shortly after defendant's arrival in California, plaintiff had become acquainted with defendant and thereafter performed various legal services for her.

On July 26, 1927, plaintiff and defendant entered into a written agreement whereby plaintiff was employed "to act as attorney for and to render all legal advice to said Dolores A. del Rio, and to represent her in all matters which may now or hereafter be pending in any of the Courts of the State of California brought by or against said Dolores A. del Rio during the continuance and term of this Agreement; and to prepare all contracts and render, all and singular, such legal services for and in behalf of said Dolores A. del Rio" as said Dolores del Rio might reasonably require. The agreement was to cover the period from March 30, 1927, to March 30, 1931.

As a "retainer fee" under said agreement, it was agreed that plaintiff should be paid as follows: "One Hundred Dollars (\$100.00) per month, payable monthly, in advance, on the first day of each month during the term of this contract. In addition to said \$100.00 monthly, the party of the second part is to receive and shall be paid by the parties of the first part, (meaning Dolores del Rio and her husband) at the end of each thirteen weeks or quarterly period during the life of this contract a sum of money equal to One Per Cent (1%) of the net amount received and/or collected by the said Dolores A. del Rio by virtue of her profession of actress during the said preceding thirteen weeks or quarterly period, whether the said moneys be received as salary, commission, percentage or royalty from moving pictures,
* * * the monthly payments of \$100.00

each theretofore paid during such quarterly period shall be deducted from and credited upon the percentage, if any, payable at the end of said thirteen weeks or quarterly period as aforesaid." Certain other provisions are found in said agreement providing for the calculation of plaintiff's compensation under certain contingencies. Among these provisions is found the following: "It is understood that the Party of the Second Part has already and now is rendering valuable services to the Parties of the First Part, and that part of the consideration for this contract is the deferring of the payment of reasonable fees and the spreading of payment of the same over a period of time; and it is agreed that the Party of the Second Part shall in no event be obligated to render extraordinary services requiring his leaving the City of Los Angeles on legal business for the Parties of the First Part without additional compensation, or which may require his remaining away from his office in any legal matter for more than two days during any one month."

Among other provisions of said agreement is found the following: "It is agreed and understood that the Party of the Second Part in accepting this employment, agrees that he will not accept any employment or retainer from any individual, syndicate or corporation wherein the subject of such employment would adversely affect the interests of said Dolores A. del Rio."

No question is raised concerning the validity of said agreement nor is any question raised concerning the performance of the services by plaintiff. In fact, it is conceded that plaintiff performed numerous and varied types of legal services for defendant under said agreement until September, 1929, and that all of said services were satisfactorily performed. Defendant's success continued, and plaintiff, defendant, and Mr. Carewe remained upon the friendliest terms for some time. Among the many services rendered under said agreement was the negotiation and preparation of an agreement in January, 1928, whereby Feature Productions, Inc., a subsidiary of United Artists, was to produce seven plays in which defendant was to star under the direction of Mr. Carewe and for which she was to receive compensation amounting to approximately \$700,000. Shortly thereafter and in said month of January, 1928, plaintiff entered into a written agreement with Mr. Carewe for the performance of legal services for said Mr. Carewe. In said agreement the existence of plaintiff's agreement with defendant

was set forth and it was agreed "that the said Dolores del Rio shall have priority in the right of the services of Lessing, and the said Lessing shall be at liberty to accept any cause, give advice and render legal service for the said Dolores del Rio even though the same may contravene or be antagonistic to the rights or interests, or what may appear to be the rights or interests of Carewe * * * and in such event Lessing may advise Carewe either orally or in writing that he cannot represent him or render any services in any such question, case or cause which may arise because the same may be or may appear to be contrary to, or in contravention of the rights or interests of the said Dolores del Rio."

While it does not appear that defendant knew the exact terms of said agreement, it does appear that defendant knew that plaintiff had represented and was representing Mr. Carewe in many matters and that defendant made no objection thereto. Furthermore, defendant admitted on the witness stand that plaintiff had told her on numerous occasions that he was obligated to represent her as against Mr. Carewe in any matter where their interests might conflict. The friendly and successful relationship of these parties continued until 1929, when certain differences arose between defendant and Mr. Carewe. Their differences did not involve legal questions but purely personal differences of opinion and antipathies. Defendant lost confidence in Mr. Carewe and felt that she could not achieve her highest ambitions under his direction. She was desirous of having her pictures titled, "Joseph N. Schenck presents Dolores del Rio" rather than having the title show that she was being presented by Mr. Carewe. She conferred with Mr. Schenck and Mr. Considine of United Artists in September, 1929. These gentlemen were agreeable of taking over defendant's existing contracts or making a new contract with her. Mr. Carewe was likewise agreeable to such an arrangement. Mr. Carewe had previously conferred with Mr. Schenck and agreed with him regarding the basis upon which Mr. Carewe would be compensated in the event this arrangement was carried out. Defendant was very happy over her conference with Mr. Schenck and Mr. Considine and promptly communicated the good news to plaintiff at his home where she dined with plaintiff and Mrs. Lessing.

At that time arrangements were made for plaintiff to proceed with the necessary negotiations with United Artists to work out

defendant's plans. In their conversation, plaintiff advised defendant that Mr. Carewe had asked plaintiff to represent him also in this matter. He told her that he saw no conflict of interest, but if she so desired, he would not represent Mr. Carewe. Defendant stated that she had no objection; that all she wanted was to "get rid of him" (meaning Mr. Carewe) and to be presented by Mr. Schenck. It was then understood that plaintiff would proceed with the negotiations on the following morning. The foregoing conversation was not denied by defendant at the trial but she merely stated that she did not remember.

The following morning plaintiff talked with Mr. Carewe and thereafter telephoned defendant, told her of his conversation with Mr. Carewe, and again asked her if she had any objection to his representing both defendant and Mr. Carewe in dealing with United Artists. Defendant stated that she had no objection, and plaintiff thereupon proceeded to confer with certain representatives of United Artists. Defendant in substance admits having the above-mentioned telephone conversation. She claimed upon the trial that she was "shocked" by the suggestion that plaintiff represent both herself and Mr. Carewe, but admits, "I just said 'That is all right.'" About half an hour thereafter she telephoned back to plaintiff and discharged him as her attorney. Plaintiff again told defendant that if she had any objection to his representing Mr. Carewe, he would not do so, but defendant said to plaintiff: "It is too late now. I want another attorney." By this telephone conversation, the admittedly friendly and wholly satisfactory professional relationship which had theretofore existed at all times between plaintiff and defendant was abruptly terminated by defendant.

Upon the foregoing evidence the trial court found "that in the month of September, 1929, without cause or justification, the defendant discharged the plaintiff as such attorney, and that plaintiff was thereafter by the act of said defendant prevented from fully performing his contract according to the terms and tenor thereof." The trial court therefore proceeded upon the theory that plaintiff was entitled to recover upon a quantum meruit for the services performed.

[1-3] Appellant first contends that the evidence is insufficient to sustain the finding that respondent was discharged without cause or justification, but we find no merit

in this contention. In support of the contention that respondent was rightfully discharged appellant cites and relies upon *Anderson v. Eaton*, 211 Cal. 113, 293 P. 788; but neither the holding in that case nor the language employed in the opinion is determinative of the question before us. It is sufficient to point out with respect to the decision in that case that there was not only actual litigation pending before the industrial accident commission but there was also contemplated litigation against a third party tort-feasor. Obviously the attorney for the employer's insurance carrier could not properly represent the conflicting interests of both the insurance carrier and the mother of the deceased employee under the circumstances, and the contract of employment between the attorney and the mother of the deceased employee was declared void as against public policy. While there is strong language used in the opinion, we find nothing therein to indicate the view that the circumstances before us would justify the discharge of respondent. In the present case there was no litigation pending or contemplated. Appellant and Mr. Carewe were both seeking to terminate the relationship theretofore existing and to establish a new relationship with United Artists. Their general objective was the same. There is ample testimony to show that the terms upon which this general objective would be reached had been substantially agreed upon by each of said parties with the representatives of United Artists, and that the possibility of any conflict of interest arising between appellant and Mr. Carewe in accomplishing this objective was entirely remote. Under these circumstances, we see no reason why respondent might not represent both appellant and Mr. Carewe with the knowledge and consent of both in concluding the negotiations and drawing the necessary agreements.

We are fully aware of the delicacy of the questions which can arise in cases where an attorney attempts to represent two parties whose interests might develop a conflict. But in the absence of litigation or contemplated litigation, the general rule prohibiting the representation of clients with conflicting interests by a single attorney has never been so broadly stated as to preclude an attorney from ever accepting employment from two different persons merely because of a possibility of a conflict of interests. The general question of "Representing Conflicting Interests" is dealt with at some length in *Thornton on Attorneys at*

Law, § 174 et seq.; and the author states in section 176, page 314: "The question as to whether there is any inconsistency in representing particular interests must depend largely upon the facts presented by each case." Again, in section 175, at page 312, it is said: "The position of an attorney who acts for both parties to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one." See, also, 6 Cor. Jur. p. 619 et seq. § 105; *Hobart's Adm'r v. Vail*, 80 Vt. 152, 66 A. 820; *Lawall v. Groman*, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; *Deering v. Schreyer*, 27 Misc. 237, 58 N. Y. S. 485. Were this not the rule, the common practice of attorneys in acting for both partners in drawing articles of copartnership or drawing agreements for the dissolution of copartnership, in acting for both the grantor and the grantee in the sale of real property, in acting for both the seller and purchaser in the sale of personal property, in acting for both the lessor and the lessee in the leasing of property, and in acting for both the lender and the borrower in handling a loan transaction, would be prohibited even though done in the utmost good faith and with the full consent of all parties concerned. In each of these instances there is the possibility of conflict, if not an actual conflict, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both. In the present case, the evidence fails to disclose any such conflict of interest between appellant and Mr. Carewe as would prevent respondent from representing both of them with their consent in dealing with United Artists. Said parties may have felt that it was to the advantage of both to be represented by one attorney who was familiar with their affairs for the purpose of amicably consummating their plan. As there was ample evidence including the admission of appellant to show that appellant had given her consent to respondent's representation of Mr. Carewe as well as herself and that appellant had discharged respondent without giving him the opportunity of withdrawing as attorney for Mr. Carewe, there was ample evidence to sustain the finding that the discharge was without cause or justification.

[4, 5] Appellant makes two further contentions which may be discussed together.

The first of these is that the trial court should have found that respondent's claim had been fully paid and satisfied because of the payment by appellant of the amounts specified in the contract up to the time of the discharge and that the trial court's findings to the contrary are not sustained by the evidence. The second of these contentions is that the trial court should have limited respondent's recovery "at all events, to the contract price." Under the facts before us, we find no merit in either of these contentions.

It is well settled that one who is wrongfully discharged and prevented from further performance of his contract may elect as a general rule to treat the contract as rescinded, may sue upon a quantum meruit as if the special contract of employment had never been made and may recover the reasonable value of the services performed even though such reasonable value exceeds the contract price. *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 P. 86; *Hart v. Buckley*, 164 Cal. 160, 128 P. 29; *Welch v. Gunn*, 101 Cal. App. 359, 281 P. 704; *Laiblin v. San Joaquin Agr. Corporation*, 60 Cal. App. 516, 213 P. 529; *Davidson v. Laughlin*, 138 Cal. 320, 71 P. 345, 5 L. R. A. (N. S.) 579; *Adams v. Burbank*, 103 Cal. 646, 37 P. 640; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 P. 514; *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; *Gray v. Bekins*, 186 Cal. 389, 199 P. 767; *Williston on Contracts*, § 1459; *Woodward on Quasi Contracts*, § 269.

Appellant, however, seems to take the position that the present case falls within an exception to the general rule and cites sections 266 and 351 of the Restatement of the Law of Contracts, the latter section being entitled "Part Performance for which the Contract Provides a Definitely Apportioned Exchange." Appellant cites other authorities relating to so-called divisible or apportionable contracts and contends that the contract here was divisible or apportionable and as payments had been made for the portion of the services performed, no recovery could be had upon a quantum meruit for such services. Many of the authorities cited by appellant were also cited in the recent case of *Boomer v. Muir* (Cal. App.) 24 P. (2d) 570. While a hearing was granted in that case by the Supreme Court and the appeal was thereafter dismissed, we refer to the decision therein for a discussion of said authorities. See, also, authorities collected

and discussed in an article found in volume XXIII, *California Law Review*, p. 313.

But in the present case we are not called upon to determine the question of whether the claimed exception to the general rule is recognized in this state in cases of divisible or apportionable contracts as the contract here was clearly neither divisible nor apportionable. In other words, the contract did not provide for a "definitely apportioned exchange" of the services to be performed during any one period for the payments to be made during such period. Any possible doubt which might have otherwise arisen regarding this question is dispelled by the following recital found in the contract: "It is understood that the Party of the Second Part has already and is now rendering valuable services to the Parties of the First Part, and that part of the consideration for this contract is the deferring of the payment of reasonable fees and the spreading of payment of the same over a period of time." The contract was therefore entire rather than divisible or apportionable and, under the general rule above mentioned, respondent's recovery was not limited by the amount of the payments theretofore made under the contract nor by the contract price.

In connection with the claim that the recovery should have been limited in any event to the contract price, it may be further stated that there was no means of ascertaining the "contract price" in the present case. Respondent had agreed to perform all necessary legal services for appellant during the term of the contract. Even the amount of the total retainer fee to be paid was dependent upon several contingencies under the terms of the contract, but in addition thereto respondent was to receive additional compensation for any services which required him to leave the city of Los Angeles or which required him to remain away from his office for more than two days in any one month. As the "contract price," or in other words respondent's total compensation under the contract for the entire term thereof, could not therefore be determined in the present case, the dictum quoted by appellant from *Elconin v. Yalen*, 208 Cal. 546, at page 549, 282 P. 791, 792, can have no application. Similarly in that case the "contract price" could not be determined from the contract of employment and the court there continued by stating, "Said contract, however, lacking any provision whatsoever by which to measure plaintiff's

compensation, he was entitled to recover the reasonable value of said services admittedly rendered by him, before his discharge by defendants."

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



6 Cal.App.2d 710

CHRISTIE v. COMMERCIAL CASUALTY
INS. CO. et al.
Civ. 5294.

District Court of Appeal, Third District,
California.

May 13, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Highways ⇨113(5)

Foreman of subcontractor on road construction work held entitled to maintain in his own name action for wages on common-law bond given contractor by subcontractor, conditioned on payment for materials and labor.

2. Highways ⇨113(5)

That subcontractor's foreman received share of stock in corporation holding subcontract on road construction project, and thereafter acted as vice president thereof, did not preclude him from recovering amount of his wages in action on subcontractor's bond given contractor, conditioned on payment for work and labor, where foreman was paid and claimed no compensation as officer and continued to perform duties as foreman.

3. Highways ⇨113(5)

Common-law or statutory bond to secure payment of labor performed on public work pursuant to contract should be liberally construed.

4. Highways ⇨113(5)

Common-law bond given by subcontractor to contractor on government road construction project to secure payment of "work" done of any kind held to render surety liable for payment of compensation to foreman of construction work.

The terms "labor" and "work" include both mental and physical effort, and work is defined as consisting of physical or mental effort while labor is defined as

physical or mental toil, bodily or intellectual exertion.

[Ed. Note.—For other definitions of "Labor" and "Work," see Words & Phrases.]

5. Highways ⇨113(5)

In action by foreman for wages, surety on subcontractor's bond given for highway construction work waived defense based on foreman's having acted as vice president of corporation holding subcontract, where surety, with knowledge of change of foreman's relationship, orally promised to pay foreman's claim in return for bills of sale from subcontracting corporation.

6. Highways ⇨113(5)

Surety on highway construction bond claiming release because of alteration of instrument or changed relationship of claimant for wages must disavow liability promptly, or within reasonable time.

7. Frauds, statute of ⇨144

Failure of defendant as surety to object to evidence of its oral agreement to pay foreman's claim asserted under subcontractor's highway construction bond held waiver of defense that oral agreement to pay was within statute of frauds (Civ. Code, § 1624).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Howard L. Christie against the Commercial Casualty Insurance Company, the Bodenhamer Construction Company, and another. From a judgment in favor of plaintiff against some of the defendants, defendants named appeal.

Affirmed.

Ernest T. Hall and Richard Pausch, both of San Francisco, for appellants.

Nelson & Ricks, of Eureka, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant Commercial Casualty Company, a corporation, has appealed from a judgment rendered jointly against it and the Redwood Construction Company, Limited, as principal and surety, upon a bond which obligates the insurance company to pay "for any work done * * * of any kind" by the construction company in fulfillment of a contract with the United States government to build a public roadway in the General Grant National Park in Fresno county. The plaintiff sued the prin-

principal and surety on the bond for labor performed for an agreed compensation as foreman of the construction work. The appellant contends it was released from liability on the bond by the change of membership of shareholders in the construction company after the plaintiff was employed as foreman by means of which one share was transferred to the plaintiff, and he thereafter became an officer of the corporation and that the bond does not contemplate the payment of the wages of a foreman.

The defendant Bodenhamer Construction Company, against which no judgment was rendered, held a contract with the United States government for the construction of the roadway. The defendant Redwood Construction Company, Limited, was a subcontractor which actually performed the work of building the roadway. July 15, 1931, the plaintiff was employed by the Redwood Construction Company as foreman of the road work at an agreed salary of \$250 a month. July 21, 1931, the Redwood Construction Company, as principal, and Commercial Casualty Insurance Company, as surety, executed a bond to Forrest N. Bodenhamer, doing business under the name of Bodenhamer Construction Company obligating themselves to pay for "any materials, supplies, teams, implements or machinery furnished," and for "any work done thereunder of any kind" by the subcontractor. The Redwood Construction Company was incorporated in February, 1931, with three shareholders, consisting of Thomas and Eleanor Engelhart and Norman O. Underwood. August 11, 1931, Underwood resigned as vice president of the last-mentioned company, and assigned his one share of stock to the plaintiff, Christie, who thereafter attended the meetings of the construction company and participated therein as vice president. It does not appear that he received any profit or pay for his services as an officer of the company. He apparently became a mere nominal member of the company. No change was made in his duties as foreman of the construction work, or in his compensation previously agreed upon. He continued to perform his work as foreman in exactly the same manner that he did before he became a shareholder and officer in the company. In September, 1931, as such vice president, Christie executed three bills of sale to certain machines from the Redwood Construction Company to E. T. Hall, who was then

the general attorney for the Commercial Casualty Insurance Company. The appellant then had knowledge of the fact that Christie was an officer of the Redwood Construction Company, but made no protest against the change in the shareholders of the corporation, or against his participation as an officer thereof. In fact, Mr. Hall, as general attorney for the surety company, then negotiated with Christie as a representative of the construction company to settle certain claims regarding the use of the machines in question.

The Redwood Construction Company defaulted in its payments of certain claims for services performed in the construction of the roadway, among which was a balance of \$1,117.90 due the plaintiff as foreman of the job. This suit was brought by the plaintiff against the principal and surety on the bond, to recover the balance due him for services performed. The insurance company affirmatively alleged in its answer that the alteration of the relationship of the plaintiff with the construction company, when he became vice president thereof, released it from all obligation to him upon the bond. The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the plaintiff on all the material issues of the case. Judgment was accordingly rendered in favor of the plaintiff for the sum of \$1,117.90. From that judgment the insurance company has appealed.

[1] Notwithstanding the fact that the bond which is involved in this case is a common-law bond by the terms of which the contractor is assured that all materials, supplies, machinery and work of any kind which are used or performed in the construction of the roadway, will be paid by the insurer in the event of the default or failure on the part of the subcontractor to do so, the plaintiff, who is not a party to the bond, is entitled to maintain in his own name an action on the bond to recover unpaid wages earned by him as foreman of the road construction work under the contract. *French v. Farmer*, 178 Cal. 218, 172 P. 1102; *Crane Company v. Borwick Trenching Corp., Ltd.*, 138 Cal. App. 319, 32 P.(2d) 387; *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 P. 41; 23 Cal. Jur., p. 1096, § 81. The language of the bond leaves no doubt it was furnished for the direct benefit and protection of those who perform work or supply materials for the roadway in accordance with the con-

tract, although they may not be parties to that instrument.

[2] We are of the opinion the common-law bond which was given in the present case to secure the payment of all work and labor "of any kind" performed in the course of the construction of the roadway in question is security for the payment of plaintiff's agreed wages as foreman, in the fulfillment of which duties he actually performed manual labor and at all times directed and supervised the work of other employees engaged on the job, notwithstanding the fact that one share of stock in the corporation which was constructing the roadway was subsequently issued to him, and that he thereafter acted as a vice president of that organization. Before he became associated with the corporation, he was employed as foreman of the job at a fixed compensation of \$250 a month. His association with the company was a mere accommodation to enable it to continue to function after one of its three shareholders retired from the company. He was neither promised nor paid compensation for his services as an officer of that company. He claimed no pay for that service. He continued faithfully to work and perform his duties as foreman of the construction work, after he assumed the added function of an officer of the company in exactly the same manner that he did before participating in its affairs as one of its officers. It is not claimed that he is seeking pay as an officer of the company. His claim for compensation is solely for services rendered as foreman of the construction work.

[3] The appellant has cited several cases in support of its contention that an officer of a construction company may not resort to the surety bond for compensation for services performed in fulfillment of the contract, even though the work is separate and distinct from his duties as an officer of the company. These cases, however, are readily distinguishable from the present cause. Several of those decisions relied upon by the appellant were based on mechanic's liens. A common-law or statutory bond to secure the payment of labor performed on public work pursuant to a contract should receive a liberal construction so as to fulfill the evident purpose of the bond. Upon the contrary, it has been held that a suit upon a bond appertaining to the enforcement of a mechanic's lien should be more strictly construed. *Pacific Wood & Coal Company v. Oswald*, 179 Cal. 712, 178

P. 854, 855; *A. L. Young Machinery Company v. Cupps*, 213 Cal. 210, 2 P.(2d) 321; *McCormick Saeltzer Co. v. Haidlen*, 119 Cal. App. 96, 6 P.(2d) 255. In the *Pacific Wood & Coal Company Case*, above cited, it is said in that regard: "Statutes requiring bonds for the protection of persons dealing with contractors on public work are different in their purpose and effect from acts for the establishment and enforcement of mechanics' liens, and that the reasons for giving a limited construction to the latter are not applicable to the former. See *French v. Powell*, 135 Cal. 636, 68 P. 92; *Associated Oil Co. v. Commary-Peterson Co.*, 32 Cal. App. 582, 163 P. 702."

[4] The appellant contends that its bond to secure the payment of "any work done * * * of any kind" does not contemplate the payment of compensation to a mere foreman of the construction work for the reason that the term "work" refers only to manual labor. This is too narrow a definition of the word "work" as it is used in the bond. It is true that in an elaborate note following the case of *Tabb v. Mallette*, reported in 102 Am. St. Rep. 78, 91, the term "laborer" is defined in the manner contended for by the appellant in this case as applied to the principle of exemption of an employee's wages. Numerous cases are also cited by the appellant which distinguish between the services of a superintendent of construction work and mere manual labor. These cases, however, usually apply to suits to enforce mechanics' liens or a preference of laborers' claims under the Bankruptcy Act. These authorities may be readily distinguished from the present case. As the California courts have wisely held, a bond to secure a mechanic's lien was intended to give the manual workman a preference over skilled laborers, and hence the bond is more strictly construed. The same principle applies to the preferred claims of workmen under the Bankruptcy Act. But, in accordance with the California cases heretofore cited, an ordinary statutory or common-law bond to secure the payment of claims for materials furnished or labor performed should receive a more liberal construction of the language to carry out the evident intention of the parties to the instrument. We have no doubt from the language of the bond in question that the parties thereto intended to secure the payment of all materials furnished and "work done * * * of any kind" in fulfillment of the contract to construct the

roadway, including the services of a foreman, as well as the work of a manual laborer. The manner in which these terms are used will determine their meaning. We find no clear-cut distinction between the terms of "labor" and "work" as these words are primarily defined by modern dictionaries. Both of these terms include both mental and physical effort. Among the preferred definitions of the term "work" is that it consists of "physical or intellectual effort." And the term "labor" is defined as "physical or mental toil; bodily or intellectual exertion." In the case of *Wandling v. Broaddus* (Mo. Sup.) 10 S.W.(2d) 651, 655, which was a suit to recover compensation for services performed, it was held that the mere supervision of remodeling a house constitutes "labor." To the same effect are the cases of *Silver v. Harriss*, 165 La. 83, 115 So. 376, 378, and *Continental Life Ins. Co. v. Turnbough*, 151 Miss. 43, 117 So. 334. In the case of *Gaastra, Gladding & Johnson v. Bishop's Lodge Co.*, 35 N. M. 396, 299 P. 347, 349, it was held that an architect who prepared plans and specifications for the construction of a building was entitled to a mechanic's lien for "labor performed." The court there said with regard to the contention that the term "labor" applied only to manual effort, to the exclusion of intellectual work: "We regard this view as obsolete and inconsistent with that liberal construction of our mechanic's lien statutes to which this court is committed. * * * 'The appellants say the lien is given only to a person who labors, and the architect and contractor did not labor. If they did not labor, what word will characterize the service they furnished? When the architect idealized the structure and put it upon paper, what was his effort if not labor?'"

Who shall say that intelligent activity of the mind, whether it is registered in the form of plans and specifications for a building or is exercised in a wise and efficient supervision of workmen in the construction of a public roadway, is not real labor. Indeed, a little mental energy on the part of a workman is quite likely to enhance the value of his manual service. A wholesome respect for manual labor should not disparage the pursuit of any other class of honest, efficient work. To register one's ideas on paper may prove to be as laborious as scratching the surface of the soil with a hoe or a rake. It is absurd to say that a man may work or labor only by means of his hands. We are satisfied that the language

of the bond in the present case was intended to insure the payment of the foreman's compensation as well as the work of those men who handled a pick or a shovel.

The appellant has cited numerous authorities in support of its contention that it was released from all liability on the bond for plaintiff's compensation for services as foreman on account of his subsequent membership in the construction company. Upon a careful examination of each of these decisions, we are of the opinion they do not apply to the facts of this case. In the first place they are all cases in which claimants sought to enforce preferences under the United States Bankruptcy Act for the payment of compensation for services performed. All of these cases, with one or two exceptions, involved the question as to whether an officer of a corporation was entitled to a preference under the Bankruptcy Act for the payment of his salary as an officer, or for salary as an officer combined with wages for manual labor separately performed, but which compensation for the different classes of work could not be segregated under the evidence so as to determine what proportion was claimed as salary as an officer, and what proportion was claimed in compensation of manual labor. In several of these cases the claimants for a preference were presidents, or sole stockholders, or managers in absolute control of the corporations who sought to recover salary allowed by the corporation as such officers or managers. In several cases such officers did perform some incidental manual labor aside from their official duties, but sought only to recover a preference for official services in the form of a fixed salary, or when separate wages were claimed for manual labor, it was impossible to segregate that portion of the claim from the compensation for a fixed official salary. None of these cases hold, under circumstances like the present action, that a foreman of road construction work, who was hired for that particular purpose, and performed his duties as such foreman, and who claimed only compensation for his service as a foreman, is precluded from recovering upon a bond to secure the payment of "any work done * * * of any kind" upon a public roadway, merely because, as a matter of accommodation, he subsequently accepted one share of stock and acted without compensation as vice president of the organization which had previously employed him. The authorities on that subject are readily

distinguishable from this case. As an illustration, the case of *Wintermote v. MacLafferty* (C. C. A.) 233 F. 95, is an action under the Bankruptcy Act wherein the claimant sought to secure a preference for the payment of the "balance of his salary" of \$300 a month. He also acted as superintendent of millwork. His claim was for the balance of his salary as an officer, and not for labor as a mechanic in the mill. It was properly held that he was not entitled to a priority over general creditors. In the case of *Van Vlaanderen v. Peyet Silk Dyeing Corp.* (D. C.) 278 F. 993, the petitioner, under a New York labor act which gives a preference in bankruptcy cases, to mechanics, workmen, and laborers, sought to recover judgment for the balance of "his salary" of \$200 a week, allowed by the corporation of which he was president and general manager. In the case of *Irving Trust Co. v. Roth* (D. C.) 48 F. (2d) 345, 346, the claimant sought to secure a preference under the Bankruptcy Act for payment of the balance of his salary as president and sole manager of a one-man corporation. The court said: "A debt due to such a person for salary, at a rate fixed by him alone, * * * would be a plain perversion of the Bankruptcy Act." The plaintiff in the present case had nothing to do with the fixing of the amount of his compensation as foreman. It is unnecessary to review the facts of each of these authorities relied upon by the appellant. They all apply to bankruptcy cases, and furnish no authority in support of the contention that the foreman of a job may not resort to a surety bond for compensation of his services for work performed under contract, as distinguished from the salary as an officer, even though he subsequently acts in a superficial manner without salary therefor as an officer of the corporation.

[5,6] Finally, the respondent asserts that the appellant is estopped from denying its liability under the bond for the balance of his compensation for services as foreman, because, with full knowledge on its part of Christie's claim of \$1,117.90, and that he acted as an officer of the subcontracting corporation, in consideration of the transfer to the defendant of some road machinery by three bills of sale executed to it on September 20, 1932, it subsequently agreed to recognize and pay plaintiff's claim of \$1,117.90 together with other unpaid obligations of the contractor. A list of these unpaid obligations, including the

plaintiff's claim for \$1,117.90, was sent to the surety company August 16, 1932. Eleanor Engelhart, the secretary of the subcontracting corporation, testified positively and repeatedly, without objection, that these machines were transferred to the surety company by bills of sale with the understanding and agreement on the part of Mr. Hall that the surety company would release the Redwood Construction Company from all obligations and pay the claims contained in the list which was furnished to it on August 16th, including the plaintiff's claim of \$1,117.90. The appellant acknowledges the receipt of these bills of sale of machinery, but now contends that the verbal promise to pay plaintiff's claim is invalid under the provisions of the statute of frauds (section 1624, Civ. Code) and that the consideration therefor failed for the reason that the grantors had no title to the machinery which they purported to convey to the surety company.

It is the established rule of law that when a surety on a bond claims that he is released from obligation thereon because of an alteration of the instrument or on account of changed relationship of the claimant for wages, the surety must disavow his liability promptly, or within a reasonable time after learning of the alteration, or the surety will be bound by the bond in spite of the changed instrument or altered condition. *Union Oil Company of California v. Mercantile Refining Company*, 8 Cal. App. 768, 97 P. 919, 921; 33 Cal. Jur., p. 1039, § 33; 50 Cor. Jur., p. 254, sec. 412. In the *Union Oil Company Case*, supra, it is said in that regard: "The rule is just and supported by the authorities that, where a document has been altered, and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered."

And in 50 Corpus Juris, above cited, it is said in that regard: "So the rule permitting the surety to waive defenses is applied to the defense of the statute of frauds; he may pay the debt, although his promise was not in writing, and recover the amount from the principal."

In the present case, it appears that the appellant had full knowledge of the fact that the plaintiff became an officer of the subcontracting corporation after the execution of the bond and after his employment as foreman of the construction work, and

yet no protest or claim of release from the bond on that account was made until the answer was filed in this suit. On the contrary, with knowledge of the change of relationship of the plaintiff, the surety subsequently renewed its acknowledgment of liability by accepting the bills of sale of machinery with an oral promise to pay the claim of the plaintiff. This constitutes a waiver of the surety's defense on the ground that the bond was exonerated, so far as it applies to the plaintiff's claim for wages, by his acting as a vice president of the construction company.

[7] The appellant waived the application of the statute of frauds by failing to object to the evidence of an oral agreement to pay the claim. *Nunez v. Morgan*, 77 Cal. 427, 19 P. 753; *McComish v. Kaufman*, 43 Cal. App. 507, 185 P. 476; *Nielsen v. Swanberg*, 99 Cal. App. 270, 278 P. 876; *Lesser v. W. B. McGerry & Co.*, 121 Cal. App. 193, 8 P.(2d) 1058; 12 Cal. Jur., p. 941, § 110.

The record leaves a doubt as to who owned the title to the machinery in question. It is unnecessary for us to determine whether there was a failure of consideration for the new oral promise of the appellant to pay the balance of plaintiff's claim, since we have already held that he was entitled to recover on the surety bond, under the circumstances of this case, regardless of the fact that he acted as a foreman of the construction work, and performed some service as a vice president of the company.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 585

**SECURITY TRUST & SAVINGS BANK v.
SOUTHERN PAC. R. CO. et al.**
Civ. 5342.

District Court of Appeal, Third District,
California.

May 4, 1935.

I. Judgment ¶855(1)

Court possesses inherent power to enforce its judgments (Code Civ. Proc. § 128).

2. Specific performance ¶130

Decree granting specific performance of contract to purchase realty, limiting time within which defendants were required to tender deed to property and authorizing county clerk to make conveyance on defendants' failure to execute deed, should have required that purchase price of land be made available for satisfaction of judgment of specific performance when deed was delivered (Code Civ. Proc. § 128).

Appeal from Superior Court, Los Angeles County; Lester M. Roth, Judge.

Action by the Security Trust & Savings Bank against the Southern Pacific Railroad Company and another. From an order denying a motion to modify a decree of specific performance in favor of plaintiff, defendants appeal.

Reversed, with directions.

Frank Thunen, of San Francisco, for appellants.

Walter M. Campbell, of Los Angeles (Walter M. Campbell, Jr., of Los Angeles, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from an order denying their motion to modify a decree of specific performance of a contract to purchase real property so as to require a limitation of time within which the respondent may tender the purchase price of the land.

In 1885 the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, of London, contracted to purchase from the Southern Pacific Railroad Company 50,000 acres of unpatented railroad land at the price of \$1 an acre. In 1903, assuming that the grantor was unable to convey title to 1,760 designated acres of that land, the parties to the contract by stipulation agreed to exclude therefrom the last-mentioned tract. By subsequent litigation the railroad company obtained title to that excluded land from the United States government in 1918. In 1921 this plaintiff, as trustee of the Atlantic & Pacific Fibre Company, instituted suit for specific performance of the contract, including therein the eliminated tract of 1,760 acres, on the assertion that it had been excluded from the contract on account of a mutual mistake of the re-

spective parties, who erroneously assumed that the railroad company would be unable to convey title thereto. Upon trial of that cause it was held that the contract was modified to eliminate therefrom the 1,760-acre tract by the mutual mistake of the respective parties thereto. A decree for specific performance of the contract, including the 1,760-acre tract, was accordingly rendered June 4, 1928. The previous modification of the contract by stipulation was canceled, and the 1,760-acre tract was restored as a part thereof. The decree provided with respect to the terms thereof the following conditions:

"That said contract be specifically enforced as to the real property hereinabove described (being the 1760-acre tract which is involved in this appeal) and that the plaintiff be adjudged to be the owner of said real property in fee simple and entitled to a conveyance thereof upon the payment by the plaintiff to said defendants of the sum of \$1760.00, and, in addition thereto, \$22,334.82 on account of taxes paid by said Southern Pacific Land Company, with interest thereon to this date, amounting to the sum of \$7800.41, making a total of \$30,135.23 in all.

"That if the said Southern Pacific Land Company, a corporation, shall fail, refuse or neglect to make such conveyance within thirty days after this decree shall have become final, then, upon the deposit by the plaintiff with the County Clerk of said County of Los Angeles of the sum of \$31,895.23, said County Clerk of Los Angeles County, California, be and he is hereby appointed a commissioner of this court to execute such deed or deeds on behalf of said defendant Southern Pacific Land Company to the plaintiff herein, and that such transfer and conveyance when made by such commissioner shall operate as a transfer and conveyance to the plaintiff of all of said real property."

Upon appeal therefrom that decree was affirmed by the Supreme Court September 30, 1931. *Security Trust & Savings Bank, a Corporation, v. Southern Pacific Railroad Co. et al.*, 214 Cal. 81, 3 P.(2d) 1015. Before the decree became final, the defendants moved to amend the judgment to require the plaintiff to include in its tender the additional taxes paid by the defendants pending the litigation last mentioned. This motion was presented on affidavits which were filed and submitted for determination and denied on November 10, 1931.

No appeal was taken from that order. Thereupon the defendants moved the court on said last-mentioned date to require the plaintiff to pay the money specified by the decree "on or before 30 days from the date said judgment became final," and then stated to the court that the deed to the 1,760-acre tract had been executed and that the defendant "Southern Pacific Land Company stands ready to deliver the deed upon payment by the plaintiff of the amount required by said judgment and within the time aforesaid." The defendants tendered their deed of conveyance to the land in question on November 10, 1931, and again on November 18, 1931, and subsequently on February 28, 1933, each time demanding of the plaintiff the payment of the sum specified in the decree, which was at no time paid. The last-mentioned motion to require the money specified by the decree to be paid within 30 days from the date the decree became final was argued and submitted to the court November 10, 1931, and denied on March 13, 1933. The notice of appeal from the last-mentioned order was served and filed April 11, 1933.

No appeal was taken from the order of November 10, 1931, denying the motion to modify the decree so as to require the plaintiff to add to the amount of the purchase price of the land in question the taxes paid by the defendants subsequent to the rendering of the judgment. The question regarding the allowance of the additional taxes paid by the defendants is therefore not involved on this appeal.

The only question which is presented on this appeal is whether the court had authority or whether it abused its discretion by refusing to specify a limitation of time within which the decree of specific performance may be enforced. In other words, should the trial court have rendered its decree more certain by specifying a reasonable time within which the plaintiff would be required to tender the money specified in the judgment so as to entitle it to specific performance of the contract?

[1,2] It will be observed from the portion of the decree above quoted, that the court did not specifically limit the time within which the plaintiff is required to tender the purchase money specified therein. But the decree does limit the time within which the defendants are required to tender their deed of conveyance of the land in question to "thirty days after this decree shall have become final." It is further pro-

vided that, if the defendants fail or neglect to execute and tender their deed to the land within that limited time, the county clerk is appointed and authorized to execute and deliver the same. It would be an inequitable and an idle act to require the execution and delivery of the deed except upon the tender of the purchase price of the land specified in the decree. The judgment should receive a reasonable construction to carry out the evident intention of the court. A reasonable construction of the language of the decree impels this court to hold that tender of the deed within 30 days of the time when the judgment became final was required on the assumption that the purchase price of the land would also be available for satisfaction of the judgment when the deed was delivered.

The inequitable effect of denying appellants' motion to limit the time within which the plaintiff may tender the purchase price of the real property in question is to impose upon the land an interminable cloud on the title, with an obligation upon the appellants to pay all future taxes thereon at their peril, necessitating future litigation to remove that cloud, to which proceeding the defense of *res judicata* may furnish a serious problem for determination. That situation is inequitable and in apparent conflict with the inherent power of a court of equity to enforce its judgment and with the evident purpose of the language of the decree. No direct authority has been cited as a precedent for this unusual and unjust result. The only issue presented on this appeal has resolved itself into a question of supplementary procedure to enforce a decree in equity. It is a well-established principle of law that a court possesses inherent power to enforce its judgments. Section 128, Code Civ. Proc.; 34 Cor. Jur. p. 737, § 1139; *Commonwealth v. Lewis*, 253 Pa. 175, 98 A. 31, 33; *In re Cooley*, 95 N. J. Eq. 485, 125 A. 486; *Montgomery v. Tutt*, 11 Cal. 190. Section 128, Code of Civil Procedure, provides in part:

"Every court shall have power: * * *

"4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein. * * *

The text in 34 *Corpus Juris*, p. 737, § 1139, *supra*, declares: "Every court has in-

herent power to enforce its judgments and decrees, and to make such orders and issue such process as may be necessary to render them effective, and this power is not affected by the fact that the decree is final."

In *Commonwealth v. Lewis*, *supra*, the court says: "The power to enforce their decrees is necessarily incident to the jurisdiction of courts. Without such power, a decree would in many cases be useless. 'All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience to their process. Without it they would be utterly powerless.'"

In the case of *Redington v. Chase*, 34 Cal. 666, 670, it is said in that regard: "The answer to all complaints from the appellant, on the score of delay (in making a tender of the purchase price of land), is that he had it in his power at any time to hasten the action of the respondent by tendering a full performance on his own part, and if the respondent refused to comply with the decree, the court, on motion, would have ordered him to perform within a specified time, on pain of having the decree set aside."

In the present case the appellants were guilty of no laches or failure to promptly act upon the apparent omission or uncertainty of the decree, but, upon the contrary, promptly moved the court for an order limiting the time within which the plaintiff could tender the purchase price of the land and thus enforce the evident intent of the decree. This motion was, in our opinion, wrongfully denied. The court, in the interest of justice, and upon the inherent authority which it possesses to enforce its judgment, should have granted the motion and should have fixed a reasonable limitation of time within which the purchase price of the land must be paid, on penalty of vacating the decree for failure to do so.

The order is reversed, and the court is directed to fix a reasonable time within which the purchase price of the land shall be tendered by the plaintiff, on penalty of vacating the decree for failure to comply therewith.

We concur: PULLEN, P. J.; PLUMMER, J.

6 Cal.App.2d 506

CALIFORNIA JEWELRY CO. v. PROVIDENT LOAN ASS'N et al.
Civ. 8854.

District Court of Appeal, Second District,
Division 1, California.

April 29, 1935.

Rehearing Denied May 25, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Customs and usages ⇨19(2)

Evidence of wholesale jeweler's custom or usage in placing jewelry in brokers' hands under written memoranda for examination and sale on approval of their selections held inadmissible to prove oral agreement giving broker right to transfer title to jewelry so received to purchaser or pledgee (Code Civ. Proc. § 1870, subd. 12).

2. Evidence ⇨441(9)

Evidence of oral contract, giving jewelry broker right to transfer title to jewelry received by him from wholesaler for examination under memorandum of proposed sale thereof to him, held inadmissible to contradict or add to terms of written agreement (Code Civ. Proc. § 1856).

3. Sales ⇨23(3)

Written memorandum of jewelry broker's receipt of jewelry from wholesaler for examination and purchase on wholesaler's approval of his selections became parties' contract when signed and delivered by broker to wholesaler and accepted by latter; wholesaler's signature being unnecessary.

4. Evidence ⇨397(2)

Parol evidence is inadmissible to add new terms to written contract appearing on its face to be parties' complete agreement (Code Civ. Proc. § 1856).

5. Evidence ⇨413, 458

Evidence of circumstances surrounding execution of written contract is admissible for purposes of interpretation thereof, but cannot be given effect of adding new term to contract (Code Civ. Proc. § 1856).

6. Pledges ⇨24

Pledge of jewelry by broker, receiving it from wholesaler under written memorandum giving him no title thereto nor authority to transfer title to purchaser, afforded loan association, to which he pledged it as security for loan, no protection under statute prohibiting one allowing another to assume apparent ownership of former's property for purpose of transferring it from setting up title thereto to defeat pledge thereof by apparent owner to one receiving it in good faith for value; pledgee being broker's successor in interest (Civ. Code, § 2991; Code Civ. Proc. § 1856).

7. Pledges ⇨24

Sales ⇨234(7)

Possession of jewelry by broker, as mere custodian for purpose of examining it under written contract with wholesaler, was not sufficient evidence of broker's title to justify reliance thereon by purchaser or pledgee of jewelry (Civ. Code, § 2991).

8. Factors ⇨19, 21

Written agreement, providing that jewelry described was sent to broker by wholesaler for examination and remained latter's property and that sale thereof should take effect only on date of wholesaler's approval of broker's selection, held not to authorize broker to transfer title thereto to purchaser or pledgee.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the California Jewelry Company against the Provident Loan Association and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

MacFarland & Ready, J. H. Ready, and John R. Layng, all of Los Angeles, for appellant.

Friedlander & Gray and Vernon S. Gray, all of Los Angeles, for respondents.

SHINN, Justice pro tem.

In this action of claim and delivery to recover possession of one emerald-cut diamond ring and one emerald-cut loose diamond, or their value, defendants had judgment and plaintiff appeals.

The case arose out of the following facts: Plaintiff was in the wholesale jewelry business at San Francisco and Los Angeles. Defendant Provident Loan Association was in the business of loaning money upon pledges of personal property. One Kaplan was a trafficker in jewelry and precious stones. He received the property from plaintiff and on the same day pledged the same to defendant.

The court made the following findings of fact, among others:

"IV. That on April 27, 1931, Ernest L. Kaplan obtained from the plaintiff the personal property specifically described in plaintiff's complaint, upon the representation that he desired to exhibit the same to a third party, and then and there, and prior to the delivery of said property, requested the plaintiff to deliver said property to him

'upon memorandum', and pursuant to said request, the plaintiff prepared, and the said Ernest L. Kaplan executed, prior to the delivery of said personal property, the following agreement and receipt for the same, in writing, in words and figures, as follows:

" 'Kindly Return Goods by Registered Mail

" 'Packages are covered by Insurance only if properly sealed

" 'Established 1859

" 'California Jewelry Company,
Incorporated

" 'No. 65,275 Diamonds and other precious stones

" 'Memorandum San Francisco, Cal.
4/27/1931

" '704 Market Street

" 'To E. L. Kaplan

" 'The goods must be reported within.....days.

" 'No retail—all memorandum goods are to be paid for—Net Cash. The goods described and valued as below are sent to you for examination and remain our property. Sale takes effect only from date of our approval of your selection and until then the goods are to be held subject to our order, or returned to us on demand.

H G C 1 E C Ring 2.57 for 2,000.00
1495 1 E C " 2.71 @ 700.00 P C
" 'E. L. Kaplan'

"That said delivery was not made solely upon such written agreement, but upon the further expressed oral agreement that the said Kaplan might negotiate a sale of the above described personal property.

"V. That by reason of said representation, and of the request of the said Ernest L. Kaplan, the plaintiff then and there delivered said personal property to the said Ernest L. Kaplan.

"VI. That on April 27, 1931, the plaintiff California Jewelry Company allowed the said Ernest L. Kaplan to assume the apparent ownership of the above described property for the purpose of making a transfer of such property."

The court also found that the defendant pledgee loaned Kaplan (1,350, and received the property in pledge as security. Upon these facts the court held that the pledgee had the right of possession until the loan was repaid, basing this ruling upon section 2991, Civil Code, which reads as follows: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of

the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value."

[1,2] The judgment of the court obviously rests upon the finding that there was an oral agreement between plaintiff and Kaplan under which the latter was authorized to "negotiate" a sale of the property, and the finding that Kaplan was allowed to assume apparent ownership of the property for the purpose of making a transfer. The first of these findings is ambiguous and the second is a pure conclusion of law. We do not know what the court intended by finding that Kaplan might negotiate a sale of the property—whether it was intended to find that he could find a customer and agree on terms of the sale, or that he had the right to make a sale and transfer title. We will pass this ambiguity and assume that the court found that there was an oral agreement made at the same time as the written agreement under which Kaplan was given the right to make transfer of title to a purchaser. Oral testimony was introduced over the objection of plaintiff as to the custom followed by plaintiff in placing jewelry in the hands of brokers under written memoranda such as was used in the transaction in question. Plaintiff's employees were examined and cross-examined as to their practices in completing sales with or through brokers who received goods on memorandum. Evidence was also introduced of previous transactions between plaintiff and Kaplan in which the latter received jewelry on memorandum and afterwards made purchases thereof, and of other transactions in which he had received jewelry on memorandum and had returned the same without making any purchases. Testimony was also received as to the conversations between Kaplan and the manager of plaintiff's business, in which Kaplan stated in speaking of the diamonds he was receiving: "Maybe I can sell one." This statement by Kaplan is the only one made by either of the parties at the time the writing was signed which could possibly be construed as an agreement in addition to or differing from the terms of the written agreement. The only other evidence in the record which would tend in any way to support the finding that there was an oral agreement as well as a written one, is the evidence of custom to which we have referred. It is unnecessary to set forth this evidence in detail. It is relied upon by respondent to support the finding that Kaplan

had authority to transfer title to the property. This evidence had a tendency to support the finding; whether it was sufficient for that purpose is unnecessary for us to decide.

We are of the opinion that evidence of custom or usage was inadmissible to prove any contract between the parties, and we are also of the opinion that evidence tending to show any oral contract between plaintiff and Kaplan was likewise inadmissible for the purpose of contradicting or adding to the terms of the written agreement.

[3] The writing signed only by Kaplan and delivered by him to and accepted by plaintiff became their contract. Plaintiff's signature thereon was not necessary. 6 Cal. Jur. 233, and cases cited.

Under section 1870, subd. 12, Code of Civil Procedure, evidence of usage to explain a contract is admissible only when the meaning is not otherwise plain, but never except as an instrument of interpretation. The contract in question is not ambiguous. It clearly provides that the property was given to Kaplan for the purpose of examination, that title was to remain in the jewelry company, that the property was to be returned on demand and that a sale would only take place if Kaplan selected property which he desired to purchase and the jewelry company approved his selection. The writing very clearly sets forth the terms of a definite understanding and agreement. The form of writing is evidently one in general use by jewelers. Agreements in almost the same language were involved in several cases to which we will hereafter refer. Extrinsic evidence was not required for its interpretation and therefore was inadmissible. It will be noted that the court does not find the contract to be ambiguous, nor is there any finding that the parties contracted with reference to any custom in the trade or what such custom may have been. The court evidently proceeded upon the theory that evidence of custom and usage might be received to establish a contract essentially different from the written contract. We do not know of any rule of evidence which supports such a theory. Section 1856, Code of Civil Procedure, reads in part as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the

writing, except in the following cases," etc. The exceptions enumerated in the section are such as mistake, fraud, ambiguity, etc., and, of course, do not include cases in which it is sought to contradict the written agreement by evidence of a contemporaneous oral agreement.

[4, 5] It must be conceded that the writing between the parties is entirely inconsistent with the idea that Kaplan had the right or authority to sell and convey title to the property of the plaintiff. The provisions of the written agreement are directly to the contrary. The contract provides for nothing except a proposed sale to Kaplan. It contains nothing indicating an understanding that Kaplan was plaintiff's agent to sell the property to a third party. If it be assumed that it was customary for brokers receiving jewelry on memorandum to find customers before completing their purchases, such facts would be inadmissible to vary the terms of the contract. Even if it be assumed that it was customary to allow a broker in such cases to transfer title, evidence of that fact could not be received to add a new provision to the contract. Parol evidence is not admissible to add new terms to a contract which appears on its face to be the complete agreement of the parties even though it is silent thereon. *Harrison v. McCormick*, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469; *Beall v. Fisher*, 95 Cal. 568, 30 P. 773. Evidence of surrounding circumstances, while admissible for purposes of interpretation, cannot be given the effect of adding a new term to a written agreement. *Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 16 Cal. App. 198, 116 P. 707, 712.

[6, 7] As between plaintiff and Kaplan, all of the evidence of custom and of the alleged oral agreement would have been incompetent. As between plaintiff and Provident Loan Association, the rule is no different. The loan association is the successor in interest of Kaplan within the meaning of section 1856, Code of Civil Procedure. If Kaplan acquired no title from plaintiff he had none to convey to a third party. If he had no authority to transfer title his pledge to the defendant company affords the latter no protection under section 2991, Civil Code. If he held possession for the purpose of examination as the contract provides, he was a mere custodian and his possession of the property was not sufficient evidence of title to justify reliance thereon by a purchaser or pledgee. *Shafer v. Lacy*,

121 Cal. 574, 54 P. 72, 74; Akron Cereal Co. v. First National Bank, 3 Cal. App. 198, 84 P. 778, 780; E. Bastheim Co. v. Schultz et al., 46 Cal. App. 24, 188 P. 841; Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Knapp v. Lyman, 44 Cal. App. 283, 186 P. 385.

In *Shafer v. Lacy* it was held that section 2991 of the Civil Code is a limitation upon the right of one having possession to make a pledge of the property which will defeat the right of the owner, and in speaking of a pledge of jewelry by one who held the property for safekeeping, the court said: "Upon principle, we can see no difference between this case and that of the pledge or sale of stolen personal property; for, when Johnson pledged it, he converted it, and his pledge was the same as if he had stolen it, and then pledged it, in which case an innocent purchaser or pledgee would take no title." Citing *Swim v. Wilson*, 90 Cal. 126, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110.

In *Akron Cereal Co. v. First National Bank* it was said, in denying the right of a pledgee to protection under section 2991, where goods had been received in pledge from the owner's agent: "'Owners of goods for commercial and other purposes must frequently intrust others with the possession of them, and the affairs of men could not be conducted unless they could do so with safety. So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title or to affect it than a mere thief.'" *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843. * * * But for the purpose of protecting a pledgee who deals with one who is in possession of property, and takes it from him in pledge under the belief that he is the owner thereof, the Legislature has enacted the above section of the Code; but by the express terms of the section it has limited the grounds of such belief on the part of the pledgee to cases in which the real owner of the property has not only 'allowed' the pledgor to assume its apparent ownership, but has done so 'for the purpose of making any transfer' of it. The pledgee must show the existence of these conditions as well as good faith on his part before he can claim a title superior to that of the original owner."

In *E. Bastheim Co. v. Schultz et al.*, property had been delivered to two persons upon the representation that they desired to ex-

hibit the same to a third party for the purpose of inspection, but who instead pledged it as security for a loan. A memorandum had been issued similar to the one in the present case. The court said: "Before making a further analysis of the findings, the well-established rule may be adverted to, to wit, that a person purchasing or receiving in pledge personal property from another is bound to ascertain what the title and right is of the proposed vendor or pledgor, and that mere possession alone, at best, only furnishes prima facie evidence of ownership. This rule is, by the Code, made subject to one modification, and that is that where an owner allows another to assume the apparent ownership of property 'for the purpose of making any transfer of it' (Civ. Code, § 2991), he cannot defeat the right of a pledgee who, in good faith, has made advances, relying upon the apparent ownership of the possessor."

A case directly in point is *Green v. Wachs*, 254 N. Y. 437, 173 N. E. 575, 576. In that case the jewelry was turned over to a dealer for the purpose of sale under a memorandum reading in part: "These goods are sent for your inspection. * * * Sale takes effect only from date of approval of your selection." The writing was held to be unambiguous and parol evidence as to custom previously followed between the owner and the dealer was held inadmissible. This case follows earlier New York cases, involving similar contracts, and the reasoning of the court is, we think, conclusive.

Respondent relies upon *Hambright & Walsh Co. v. Provident Pledge Corporation*, 25 Cal. App. 600, 144 P. 971, but this case is not in point. No question of the admissibility of parol evidence to vary the terms of the written agreement was involved or decided in that case.

It is clear from the foregoing authorities that the mere possession of the property by Kaplan cannot be relied upon by defendant in support of its claim as pledgee. The defendant's rights are dependent entirely upon the agreement between plaintiff and Kaplan. Defendant claims no title or right except through Kaplan. If the latter had the right to sell the property and to transfer title, a purchaser from him would take good title. Section 2991 extends the same right to a pledgee. But if Kaplan was a mere custodian, a purchaser from him would take no title. A pledgee can stand in no better position.

[8] There was, therefore, no competent evidence of any contract upon which defendant may rely except that furnished by the written agreement. This being true, the case of *E. Bastheim Co. v. Schultz et al.*, supra, is decisive. In that case, under an agreement substantially the same as the one here involved, it was held that the custodian had no authority to make a transfer of title.

Judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



In re SCHNOOR'S ESTATE.*

VOLKMANN et al. v. VINSON et al.
Civ. 9806.

District Court of Appeal, First District,
Division 2, California.
May 21, 1935.

Hearing Denied by Supreme Court
July 17, 1935.

Wills 179

Second holographic will, which contained no revocation clause and which testatrix later tore up, held not to revoke former will so as to prevent probate thereof, where second will made substantially same disposition of property; only difference being in quantum of bequest to residuary legatee (Probate Code, §§ 72, 101).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceedings in the matter of the estate of Emilie D. Schnoor, deceased. From orders admitting to probate a will and granting letters of administration with the will annexed to Albert E. Hill, Margaret Volkmann and C. O. Schnoor, contestants, appeal, opposed by Evelyn H. Vinson and another.

Affirmed.

Paul A. Lindley, of Oakland, for appellant.

Earl Warren, Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., both of Oakland, for respondent Albert E. Hill, administrator.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent Evelyn H. Vinson.

STURTEVANT, Justice.

These are appeals by certain heirs who are next of kin of the decedent Emilie D. Schnoor from an order admitting to probate a purported will dated December 16, 1930, and from an order granting letters of administration with the will annexed to the respondent Albert E. Hill, the public administrator of Alameda county. On December 16, 1930, the decedent executed a holographic will in words and figures as follows:

"Alameda, Calif., Dec. 16, 1930

"I, Emilie D. Schnoor, a single woman, never having been married, over 21 years and being of sound and disposing mind and memory, and not acting under any duress, menace, fraud, or undue influence of any person whatever, do make and declare this my last Will and testament in following manner: that is to say

"1. I direct that my body be cremated and that no excessive amount be expended either in cremation or in funeral expenses.

"2. I give and bequeath to Evelyn Hunt Vinson all my real and personal property.

"3. Should any person or persons legally related to me seek to establish or assert any claim or claims to my Estate, or any part thereof, or should such person or persons attack or oppose, or seek to set aside this Will or impair, or invalidate or set aside any of its provisions, I hereby give, devise and bequeath to such person or persons the sum of One Dollar (\$1.00), and no more, in lieu of any share, legacy, bequest, gift, or interest in my estate. This provision is made after mature deliberation, as my relatives have no legal claim against me or my Estate; furthermore, they all for a number of years, during sickness and in health practically ignored my existence and have been of no comfort, nor have they extended me any assistance whatever.

"I hereby nominate and appoint A. B. C. Dohrmann of the City of San Francisco, Calif., Executor of this my last will and testament to serve without Bonds, and I hereby revoke all former wills made by me.

"Emilie D. Schnoor."

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

For subsequent opinion see 51 P.2d 424.

Some months later the decedent made a trip to Los Angeles. While down there, on October 20, 1932, she wrote the second will. So far as it is material to this case it provided:

"My Last Will

"I write this in case of an Accident, we never know. I want Evelyn Hunt Vinson and Miss Ada Boye of Hayes St S. F. to see that my last wishes are attended too. (Here follow several bequests.)

"Miss Ada Boye \$100.00 everything else is for you to do as you please

"Emilie D Schnoor

"—I should have written this over

"—no time as I am leaving for home in half an hour

"Emilie D Schnoor

"sending this to myself in your care, so you can open it. I want you to"

Having done so she mailed it to herself in care of Mrs. Vinson at Alameda. The next day she arrived in Alameda. On arriving there the decedent showed to Mrs. Vinson the document dated October 20, 1932, and then tore it up. The torn pieces she put in an envelope, and in that form that document was placed among her belongings, where it and the will dated December 16, 1930, were found after her death. Mr. Johnson pasted the torn pieces together and filed both documents with the county clerk.

Mr. Dohrmann, named as executor in the first will, renounced his right to act as executor. The public administrator filed a petition asking that the first will be admitted to probate and that letters be issued to him with the will annexed. C. O. Schnoor, a brother of the decedent, and Margaret Volkmann, a sister, filed contests claiming the decedent died intestate. Evelyn H. Vinson filed answers to both contests. On the hearing evidence was introduced showing that the decedent owned properties in addition to those specifically mentioned in the document dated October 20, 1932, but the record does not show the value of the excess. The trial court granted the petitions of the public administrator. The brother and sister have appealed.

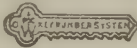
At this time the appellants contend that the document dated October 20, 1932, revoked the earlier one. Both sides agree that the document dated October 20, 1932, was revoked by the decedent *animo revocandi*.

The appellants earnestly contend that because the second will disposed of the entire estate therefore the later will ipso facto revoked the former. In *re Iburg's Estate*, 196 Cal. 333, 238 P. 74. Continuing they claim the decedent died intestate. The respondents reply that such result follows only when the second will disposes of the entire estate to persons other than those taking under the earlier will or when, considered from its four corners, it indicates a testamentary intent wholly inconsistent with that obtaining in the earlier will that it operates as a revocation of such earlier will. In *re Bassett's Estate*, 196 Cal. 576, 580, 238 P. 666. We think that distinction is well founded. *Simmons v. Simmons*, 26 Barb. (N. Y.) 68, is the only case in England or America which has been cited contrary to respondents' reply, and in our search we have found no others. But, although *Simmons v. Simmons*, supra, has been cited by text-writers as an authority, an examination discloses that the case was reversed. *Simmons v. Simmons*, 24 How. Prac. (N. Y.) 611. Furthermore, our statute (Probate Code, § 72) provides that when a second will does not contain a revocatory clause it does not revoke a prior will unless its provisions are "wholly inconsistent" with the provisions of the earlier will. Now in the instant case Mrs. Vinson was in effect, the residuary legatee under both wills. The only difference being as to the quantum of her bequest. Under the plain provisions of the statute it may not be said the decedent's wills were wholly inconsistent—they were only partly so. It follows that if the second will had not been destroyed both wills would have been admitted to probate. Probate Code, § 101. In *re Toomey's Estate*, 96 Mont. 489, 31 P.(2d) 729, a decision by the Supreme Court of Montana, is particularly applicable as the Montana statute on wills was taken from the California statutes. The decedent, Toomey, left two holographic wills. By the first he left all of his estate to Harrington. Later he wrote a letter to Harrington. It was testamentary in character. By that letter the decedent asked Harrington to pay \$1,000 to each of two nephews of the decedent and "to keep the rest." The trial court held the latter document did not revoke the former and it admitted both documents to probate as the will of the decedent. On page 732 of 31 P.(2d) the court said: "The court correctly held that the two instruments must be

construed together in ascertaining the intention of the testator. In *re* Danford's Estate, 196 Cal. 339, 238 P. 76. The letter of April 18, 1932, if considered a will, would not revoke the former will, as it did not contain 'an express revocation, or provisions wholly inconsistent with the terms of the former will'; the former will 'remains effectual so far as consistent with the provisions of the subsequent will.' Section 6998, Rev. Codes 1921." We find no error in the record.

The orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



**FEIG v. BANK OF AMERICA NAT. TRUST
& SAVINGS ASS'N et al.***
Civ. 9523.

District Court of Appeal, First District,
Division 2, California.

May 14, 1935.

Rehearing Denied June 13, 1935.

Hearing Granted by Supreme Court
July 11, 1935.

1. Trusts ⇨81(3)

In suit by surviving husband to impress trust on property standing in name of deceased wife with whom he lived in ignorance of divorce obtained by wife, whom he later remarried, mere occasional separation of spouses did not prevent recovery where there was no proof of any period of willful desertion by either.

2. Trusts ⇨89(1)

Evidence, in suit by surviving husband to impress trust on property standing in name of deceased wife, sustained finding that husband continued to live with wife without knowledge that wife had obtained decree of divorce until wife suggested remarrying.

3. Trusts ⇨90

Whether properties standing in name of deceased wife were her separate properties held question of fact in action by surviving husband to impress trust thereon, though husband in guardianship proceedings for wife had specified properties as belonging to her, where there was evidence of agreement that wife should take title to and handle all properties for equal benefit of herself and husband.

4. Judgment ⇨743(1)

Decree, in proceedings to establish record title to wife's property after fire in which records were destroyed, held not to bar subsequent suit by husband to impress trust on property after wife's death, though husband's interest was not expressly protected by decree.

5. Trusts ⇨87

In suit by surviving husband to impress trust on property standing in name of deceased wife, evidence of amount of property which each party originally owned, amount received by each while they were living together, and amount of their joint accumulations, held properly admitted.

6. Trusts ⇨374

Award to husband of interest in property standing in name of deceased wife, which was acquired through joint efforts of parties under trust whereby property was held by wife for benefit of both, should under evidence be limited to one-half interest in deceased wife's property as in case of community property, where acquisitions were made during period when husband lived with former wife in ignorance of divorce decree obtained by her, and he later remarried her.

7. Trusts ⇨374

Where spouses accumulate property jointly, and exact amount of contribution of each is not clear, trial court in undertaking to divide fund will not undertake to ascertain how many dollars each spouse contributed but as a general rule will divide the fund equally.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Joseph Feig against the Bank of America National Trust & Savings Association and others. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Leo R. Friedman and James J. Harrington, both of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondent.

STURTEVANT, Justice.

As the surviving husband the plaintiff commenced an action against the defendants to impress a trust on certain real and personal property standing in the name of his wife on the date of her death. On the trial he was nonsuited. An appeal was taken and the judgment was reversed. Feig

v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.(2d) 421. The facts presented by that record are quite fully stated in that decision and need not be repeated. After the remittitur went down, other proceedings were had which resulted in a judgment in favor of the plaintiff impressing a trust on all of the property. On the second trial additional evidence was introduced and the particular facts before the court will be referred to as occasion requires. From the judgment entered in favor of the plaintiff the defendants have appealed.

At this time the defendants make two major points. In the first one they contend that the plaintiff was not entitled to anything. In the second point they contend that the trial court in determining the amount of the plaintiff's interest in the property committed prejudicial error in awarding him anything in excess of fifty per cent. thereof.

In contending that the plaintiff was not entitled to anything the defendants attack several specific items of evidence.

[1] In *Feig v. Bank of Italy, etc., Ass'n*, supra, 218 Cal. 54, at page 58, 21 P.(2d) 421, 422, the court said: "If, as plaintiff contends and his evidence tends to show, *he continuously lived with the decedent from the date of their marriage in 1889 until the decedent's death in 1929 in absolute ignorance of the existence of the divorce proceeding and the decree therein entered, and innocently and in good faith believed himself at all times to be the lawful husband of the decedent, he is entitled to an equitable apportionment of the gains made by their joint efforts.*" (Italics ours.) The defendants stress the language which we have italicized and assert that the doctrine of the cases cited is such as to make it a condition precedent that the plaintiff should have pleaded and proved that the parties continuously lived together as man and wife. They then assert that the evidence shows at times Mrs. Feig was absent in Washington and at other times she was absent in Arizona. The record does not show that these trips were not mere visits and there is certainly nothing to show any period of wilful desertion on the part of either of the parties. The point may not be sustained.

[2] As recited by the court in *Feig v. Bank of Italy, etc., Ass'n*, supra, it was the contention of the defendants that Mr. and Mrs. Feig were married in 1889; that they were divorced in 1890; that the records of

that proceeding were burned in 1906; that the records were restored March 23, 1912; and that the parties were a divorced couple from 1890 to 1921, at which time it is conceded they remarried. It is also a conceded fact that the properties in dispute were accumulated during said period. In this connection the defendants contend that by virtue of the divorce proceeding the plaintiff was wholly concluded. They contend that by virtue of the recitals of the judgment in the divorce proceeding it is conclusively proved in this collateral proceeding that the plaintiff was served with summons. He stoutly denies he was served with a summons but concedes the point of law that he is concluded by the recital. However, he contends there is no presumption that every divorce action is conducted to a final decree nor that the final decree is in favor of the plaintiff. And taking another step he vigorously contends that he never knew he had been divorced until his wife suggested, in 1921, that they remarry. While it may appear that the evidence is strange and out of the ordinary, the weight thereof was addressed to the trial court. Furthermore, in this connection it may be properly remarked that the plaintiff sustained his case and corroborated his testimony by the relatives and intimate friends of both parties. Not even a brother of the decedent knew of the divorce until long after the parties had been remarried.

[3, 4] In claiming that the real estate was the separate property of the decedent the defendants call to our attention that on April 24, 1905, the plaintiff executed a deed of gift to the decedent and on March 18, 1912, he executed and delivered a quitclaim deed. Thereupon the defendants assert that the plaintiff will not be heard to claim that he did not give to the decedent his interest in the real estate. The point is not a new one. In *Jackson v. Jackson*, 94 Cal. 446, 29 P. 957, a set of facts closely similar was involved. Mr. Jackson executed to his wife a deed of gift. Shortly thereafter, for the purpose of correcting that deed, he executed to her another deed of gift, however, under the proof it was held that such facts were addressed to the trier of the facts and not to a court of review.

As will be noted in the decision *Feig v. Bank of Italy, etc., Ass'n*, supra, it was claimed by the plaintiff that he and the decedent intermarried in 1889; that from that date it was agreed the decedent should be the business head of the family and should

handle all properties acquired; and that it was further agreed to place all properties in the name of the decedent in order to carry out said plan. In that connection it was further agreed that the husband and wife should recognize such properties as the accumulation of their joint efforts and in which each should have an equal interest. In the great fire of 1906 the records of title in San Francisco were destroyed. The decedent was advised that she should commence a proceeding to establish the title of record to said property. Stat. 1906, Ex. Sess. p. 78. She informed the plaintiff and he directed her to proceed. Nothing was said by either to the effect that the decree to be obtained was to have the effect of dissolving the trust theretofore established. Thereafter a decree known to the bench and bar as a McEnerney decree was obtained in favor of the decedent. Because it did not specifically protect the rights of this plaintiff the defendants contend he is barred by that decree. The point may not be sustained. *Bradley Co. v. Bradley*, 165 Cal. 237, 131 P. 750. The only difference between the instant case and the case cited is in the relation of the date of the trust agreement to the date of the McEnerney decree. In the instant case the trust agreement was made over twenty years prior to the McEnerney decree and in the *Bradley Case* it was made only a few months before the McEnerney decree.

Shortly prior to the death of Mrs. Feig it was found necessary to commence guardianship proceedings. The plaintiff filed the petition. Therein, in attempting to specify her properties he named many, if not all, of the items involved in this litigation. The defendants contend that said statement was so inconsistent with the contention now made by the plaintiff as to be determinative. Counsel for the plaintiff freely concede that the contents of said petition constituted an admission as against interest, but they assert that such admission merely raised a conflict in the evidence and that the conflict was addressed to the trial court and not for the consideration of this court. The contention is clearly correct.

Summarizing the first point made by the plaintiff, we think it is clear it may not be said as a matter of law that the properties standing in the name of Mrs. Feig at the time of her death were her separate properties. This brings us to a consideration of the second point made by the defendants.

[5-7] That point is that under the facts contained in this record an award of all the properties to the plaintiff was not equitable. They contend the death of Mrs. Feig did not give plaintiff any greater interest in the properties than he had during her lifetime. We think the point is sound. The trial court quite properly received evidence showing " * * * the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations." *Fuller v. Fuller*, 33 Kan. 582, 7 P. 241, 244. That evidence showed they had nothing when they were married. It also showed that the plaintiff thereafter inherited \$175, invested it in railroad securities and lost it; and that the decedent inherited about \$500, deposited it in the People's Bank, it failed, and her deposit was lost. The evidence further showed that from 1889, the date of their marriage, down to the date of the death of Mrs. Feig, the plaintiff was almost continuously employed on a wage of about \$100 per month which he turned over to Mrs. Feig and that she made the investments, collected the rents, paid the bills, and deposited the surplus in bank. It also showed that she, at times, was on the stage as a songstress and that she probably earned moneys from her employment, but the evidence does not show what the amounts were. There was no evidence of the rights of any third person being involved and there was no evidence, except such as has been mentioned herein, of any act of fraud. In *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533, 11 A. L. R. 1386; *Macchi v. La Rocca*, 54 Cal. App. 98, 201 P. 143; *Jackson v. Jackson*, supra; *Figoni v. Figoni*, 211 Cal. 354, 295 P. 339, decrees in similar controversies were involved. In each one the trial court divided the properties equally. On appeal each decree was affirmed. In *Coats v. Coats*, 160 Cal. 671, 118 P. 441, 36 L. R. A. (N. S.) 844, the judgment under attack granted an annulment to the plaintiff husband but awarded the wife \$10,000. The facts seem to indicate that the husband was worth in excess of \$100,000 but the wife did not appeal. The husband did appeal but the judgment was affirmed. The court said, 160 Cal. 671, on page 678, 118 P. 441, 444, 36 L. R. A. (N. S.) 844: "Even though it may be true that, strictly speaking, there is no 'community property' where there has not been a valid marriage * * * the courts may well, in dividing gains made by the joint efforts

of a man and a woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property, where a valid marriage is terminated by death of the husband or by divorce. The apportionment of such property between the parties is not provided by any statute. It must therefore be made on equitable principles. *In the absence of special circumstances, such as might arise through intervening claims of third persons, we can conceive of no more equitable basis of apportionment than an equal division.*" (Italics ours.) While the division is to be made "by analogy" to the division of community property, the rule does not warrant the chancellor in applying the community property laws in their entirety. This must be so because as stated in the above quotation there is no statute expressly applicable. Moreover, it has been directly held that such property is not "community property." *Feig v. Bank of Italy, etc., Ass'n, supra.* As shown above, ordinarily an equal division will be equitable. As to what are the "special circumstances" which will warrant the chancellor in making a division that is not equal we will not attempt to state. That he is not called upon to cause an account to be taken of the contributions made to the fund by each one of the parties was clearly stated in *Ft. Worth & R. G. R. Co. v. Robertson*, 55 Tex. Civ. App. 309, 121 S. W. 202, 203, 204. That doctrine was quoted and followed in *Coats v. Coats*, 160 Cal. 671, 678, 118 P. 441, 36 L. R. A. (N. S.) 844. As a set of facts showing one illustration of what does constitute such "special circumstances" as will justify the chancellor in ordering a division that is not equal, we cite the case of *Buckley v. Buckley*, 50 Wash. 213, 96 P. 1079, 1083, 126 Am. St. Rep. 900. On the 11th of September, 1877, Andrew Buckley married Philomene, his first wife. On October 29, 1877, he deserted her without cause. On the 15th day of October, 1898, he married his second wife, Mary. In 1907, Philomene learned her husband was alive and residing in the state of Washington. She commenced an action for divorce and for a division of the property. Mary commenced an action for annulment and a division of the property. The trial court awarded to each wife one-fourth of the property. Philomene, being dissatisfied, appealed. On this extraordinary set of facts the supreme

court of Washington affirmed the decrees entered by the trial court and among other things said: "The value of the property was not found by the trial court. The total value was probably \$5,000 or \$6,000. Bearing in mind that appellant Buckley accumulated this property, and that he is now 66 years old, in feeble health, requiring support, medical attendance, and nursing, we cannot say that the disposition of the property, as made by the trial court, was erroneous, inequitable, or unjust." Under these authorities we think it is clear that in these cases the trial court will not undertake to ascertain how many dollars each party contributed to the fund jointly accumulated but, as a general rule, it will divide the fund equally. If, as in *Buckley v. Buckley*, there are special circumstances, the court will depart from that general rule. In the record before us no special circumstances are present.

The judgment is reversed, with directions to the trial court to enter a judgment not inconsistent with what has been said above.

We concur: NOURSE, P. J.; SPENCE, J.



6 Cal.App.2d 738

CASH v. LOS ANGELES RY. CORPORATION et al.
Civ. 8800.

District Court of Appeal, Second District,
Division 1, California.
May 14, 1935.

1. Railroads ⇨324(1)

Motorist in crossing street railway tracks which were laid on private right of way, and wherein track construction where accident occurred was that of ordinary steam railroad in open country, was required to use same care as motorist crossing steam railroad tracks.

2. Railroads ⇨327(1)

Motorist coming upon a street railway crossing with which he was entirely unfamiliar was required to take every reasonable opportunity to look and listen.

3. Railroads Ⓒ350(19)

Whether motorist coming upon street railway crossing with which he was unfamiliar, and looking, but failing to see approaching street car, allegedly because it was hidden by trolley poles, had used ordinary care in selecting place to look *held* for jury.

4. Trial Ⓒ165

On motion for nonsuit, plaintiff's evidence must be viewed in its most favorable light to plaintiff's cause.

5. Trial Ⓒ139(1), 140(1)

On motion for nonsuit, unless it clearly appears that, viewed in its most auspicious aspect, plaintiff's evidence is such that no reasonable person would credit it, it is neither material nor decisive that neither trial judge nor appellate tribunal would believe testimony of plaintiff and his witnesses, since credibility and weight of testimony was exclusively for jury.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Charles E. Cash against the Los Angeles Railway Corporation and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

W. H. Douglass, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

Plaintiff sued for personal injuries sustained in a collision between an automobile which he was driving and a street car operated by the defendants. The trial court granted the defendants' motion for a nonsuit, and plaintiff has appealed from the judgment.

The accident occurred late in the evening at a grade crossing in the outskirts of Los Angeles. Plaintiff testified that the visibility was good and there was no fog. The tracks of the defendant railroad company are laid on a private right of way along Broadway, a public street running north and south, and open for travel on each side of and parallel with the railroad tracks. The record shows that at the time of the accident the track construction was that of the ordinary steam railroad in open country.

According to the testimony given by plaintiff, and in which he was fully supported and corroborated by independent witnesses, plaintiff was driving an automobile at about 10 o'clock at night on a street which crossed the double tracks of the defendant corporation. When within 59 feet of such tracks he brought his automobile to a complete stop. Thereafter, traveling at a rate not greater than 5 or 6 miles per hour, he drove his automobile toward the railroad crossing, which was about 1 foot above the street level. After thus traveling a distance of 29 feet, and when still at a distance of 30 feet from the first rail of the street railroad tracks, he for the first time became aware of the fact of the existence of these tracks. He had never been at this crossing before. He continued to drive his automobile toward the crossing at a rate of speed not greater than 5 or 6 miles per hour. Just before his automobile reached the first set of tracks of the railroad, plaintiff again brought his automobile to a complete stop, at which time and place he listened but could hear nothing that indicated to his mind the approach of a street car. He "looked south first on that track and then north" (the latter being the direction from which the street car that struck plaintiff was approaching). He heard no bell or warning of any kind prior to the time of the accident. From the place where plaintiff stopped his automobile the second time, to wit, just before reaching the first rail of the first set of tracks, plaintiff could see, and did see, up the north track for a distance of "400 or 500 feet." He saw no street car approaching. He then "put * * * (his) car in second and proceeded to cross the track, * * * just as slow as I could; * * * I should judge four or five miles per hour." After thus stopping his automobile for the second time, and after again starting it toward the crossing, while still traveling at a rate of 4 or 5 miles per hour, and at a point "about in the center of the two (sets of railroad) tracks," plaintiff again looked; he also listened. At that time and place he neither saw nor heard the approach of the street car. He "kept right on going." It was "not until after * * * (he) got to the east rail of the west track" that plaintiff again looked north; and then it was that plaintiff saw the street car approaching him at a distance from him of 100 to 150 feet. He "stepped on the gas and tried to get off the track"; but his automobile was struck—"just the tip of the right back fender."

[1,2] The plaintiff in crossing the railroad tracks where the accident occurred was required to use the same care and caution as is required of a person crossing the tracks of a steam railway. *New York L. Oil Co. v. United Railroads*, 191 Cal. 96, 215 P. 72. While it is the rule that a traveler about to cross such tracks must look for approaching trains at a point where such looking would be effective, the most that can be required of one coming upon a crossing with which he is entirely unfamiliar is that he must take every reasonable opportunity to look and listen. What he must do depends upon the circumstances of each case. *Griffin v. San Pedro, L. A. & S. L. R. Co.*, 170 Cal. 772, 775, 151 P. 282, L. R. A. 1916A, 842; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651.

[3] Whether or not plaintiff used ordinary care in selecting the place to look was a question of fact for the jury to determine. According to his testimony, he first became aware of the presence of the railroad tracks when he was 30 feet from them, and he stopped his machine in a place of safety before entering upon the tracks, and looked and listened for approaching cars. When between the two tracks he again looked but saw no street car, and it was not until he was on the westerly track that he looked for the third time, and then saw a street car which, as far as he was aware, had neither rung a bell nor given any other warning of its approach, but which at that time was within 100 or 150 feet of the crossing.

Plaintiff's explanation of his failure to see the approaching street car is that it was hidden by trolley poles 15 inches in diameter and erected between the two tracks 62½ feet apart. His contention is that these poles, from the point where he started to cross the two tracks, appeared in an unbroken line which concealed the street car. The evidence shows without contradiction that the tracks were on a curve north of the place of the accident. A passenger on the front of the street car testified that he saw the automobile "coming across toward the white fence" in the middle of the street. Apparently from this testimony the trolley poles offered no obstruction to vision of an object to the east of, or possibly, exactly at the middle of the east roadway of Broadway, the point where plaintiff first knew that there were railroad tracks ahead of him. At just what point west of the center

of Broadway the poles interfered with the view of the street car the record does not show. To sustain the judgment therefore, we must say that because the plaintiff at an unfamiliar crossing did not look to the north for cars exactly at the point where he first became aware of the tracks, which point may have been the only position between it and the tracks where he could have seen the car, he was guilty of contributory negligence as a matter of law.

[4,5] It should be remembered that on the consideration of a motion for nonsuit the evidence adduced by the plaintiff must be viewed in its most favorable light to the cause of the plaintiff. The fact that some witness in behalf of plaintiff, or even plaintiff himself, in giving his testimony, may have contradicted or discredited himself in some particular, is not determinative. Unless it clearly appear that, viewed in its most auspicious aspect, the evidence adduced by the plaintiff is of such a character that no reasonable person would credit it, it is neither material nor decisive that neither the trial judge nor an appellate tribunal would believe the testimony given by the plaintiff or any of his corroborating witnesses. The credibility of such testimony and the weight to be given thereto lies wholly with the jury for its exclusive determination.

In a very similar case it was said: "We think the present case is not one in which it can be said that the uncontradicted evidence forces the conclusion that the plaintiff approached the track without exercising the care which an ordinarily prudent man, situated as he was, would have exercised. * * * This being so, the jury had the right to believe, from the plaintiff's story, that he took advantage of every opportunity to learn of the possible approach of a train, and that, notwithstanding his precautions, he could not, and did not, know that a train was nearing the crossing until he was in a position of danger from which he was unable, by the exercise of ordinary care, to extricate himself. *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 83 P. 440." *Loftus v. Pacific Electric Ry. Co.*, 166 Cal. 464, 468, 137 P. 34, 35.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

7 Cal.App.2d 75

**TERU SHIRAKAWA v. COLONIAL MUT.
LIFE ASS'N.**
Civ. 8668.District Court of Appeal, Second District,
Division 1, California.

May 20, 1935.

Appeal and error ⇐757(1)

Appellant's statement of questions involved on appeal from order setting aside judgment for defendant as being whether notice of motion to vacate such judgment was sufficient, in absence of statement of grounds therefor, accompanying copy of proposed amended complaint or request for permission to file it, presented nothing for review, where appellant responded to merits of motion, without objecting to defects in notice, and parties knew that copy of proposed amended complaint had been delivered to appellant's attorney and such complaint delivered to clerk of court for filing (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Teru Shirakawa against the Colonial Mutual Life Association, sued as the Colonial Mutual Life Insurance Association, Inc. From an order granting plaintiff's motion to set aside a judgment for defendant on the pleadings and vacating the judgment, defendant appeals.

Affirmed.

Charles R. Thompson, of Los Angeles, for appellant.

J. B. Mandel, of Los Angeles, for respondent.

CONREY, Presiding Justice.

After the filing and service of complaint in this action and overruling of a demurrer to the complaint, the defendant filed its answer. Thereafter the defendant gave notice of motion for judgment on the pleadings. Hearing on this motion was continued from June 22 to July 1, 1932. On July 1st, at the time when the motion was presented, plaintiff's attorney was not present in court and the motion was granted. A few days later the plaintiff gave notice of motion "to set aside judgment under section 473" of the Code of Civil Procedure. The notice did not directly state the grounds thereof, but it did state that the motion would be based upon the affidavit

in support thereof, which affidavit made by the plaintiff's attorney was duly served and filed. At the call of the motion on July 26th, the parties were represented by their respective attorneys, and the motion was heard and granted. The evidence at the hearing consisted of the affidavit of the plaintiff's attorney and a counter affidavit by the defendant's attorney. The present appeal is an appeal by the defendant from the order granting said motion and vacating the judgment.

Appellant makes the following statement of questions involved: "Is a notice of motion to vacate a judgment, rendered upon a motion for judgment on the pleadings, sufficient where said notice of motion: 1. Fails to state the grounds upon which it is made; 2. Was not accompanied with a copy of any proposed amended complaint; 3. Does not seek permission to file an amended complaint?"

It does not appear that the notice of motion contained a direct and specific statement of the grounds upon which it would be made, or that it was accompanied with a copy of the proposed amended complaint, or that it contained any request to be permitted to file any amended complaint. It does appear, however, that defendant by its attorney responded to the merits of the motion without making any objection to these or any defects in the notice of motion. It further appears that a copy of the proposed amended complaint had been delivered by the plaintiff's attorney to the defendant's attorney, and the proposed complaint had been delivered to the clerk of the court for filing. Apparently all of this was well understood at the time of the hearing of the motion, and it cannot be said that either court or counsel was misled by the notice of motion or by the fact that it was not "accompanied by a copy of the proposed amended complaint." Under these circumstances it cannot be said that the "statement of questions involved" presents any question which is the proper subject of an appeal upon the facts as shown by the record herein. We think that the appeal was frivolous and that manifestly it was made for purposes of delay.

For the foregoing reasons, the order is affirmed, and respondent is allowed, in addition to her other costs, damages in the sum of \$100.

We concur: HOUSER, J.; YORK, J.

7 Cal.App.2d 114

HARTH v. BAUM et al.

Civ. 8667.

District Court of Appeal, Second District,
Division 1, California.

May 22, 1935.

1. Mortgages ⇨350

Where owners of property prevented sale thereof under deed of trust on front steps, sale made on sidewalk directly in front of steps and only nine feet therefrom *held* sufficient compliance with notice that sale would be made on front steps.

2. Appeal and error ⇨1010(1)

Trial court's findings, supported by evidence, cannot be disturbed.

3. Mortgages ⇨369(3)

Sale of property under deed of trust for price greatly disproportionate to value will be set aside on very slight evidence of unfairness or irregularity, provided irregularity conduced to inadequacy of the price or in some other way contributed to injure party complaining thereof.

4. Mortgages ⇨369(2)

That trustee making sale under deed of trust and purchaser owning note and deed of trust securing it were officers of corporation which had guaranteed note *held* insufficient to invalidate acts of trustee in absence of some showing of fraud or misconduct.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by H. A. Harth against Callie Baum and another for unlawful detainer. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lawrence M. Cahill, of Los Angeles, for appellants.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Respondent is the grantee in a deed made by an individual trustee upon a sale under a deed of trust. The appellants are the former owners of the property and the makers of the deed of trust. Respondent brought an unlawful detainer action and recovered judgment for the possession of the property.

[1] The points presented on appeal merit little discussion. The first one is that notice was given that the sale was to be made "on the front steps of the apartment house situated on the hereinafter described property," but that it was not made at that place. The evidence shows that at the time of the sale the appellants had a guard posted on the property who would not allow the trustee or any other person thereon. The trustee therefore stood and cried the sale on the sidewalk directly in front of the steps and only "about nine feet out from the front step." The objection thereto is puerile. The sale was made at the "place" specified in the notice.

[2, 3] Appellants also complain that the trial court erroneously found that the trustee complied with all of the provisions of the deed of trust and that the property was sold to respondent on the highest and best bid. But these findings are based on abundant evidence to support them, and do not present an appealable question. And the testimony of the owner that the property was worth much more than the amount bid is not, of itself sufficient ground for setting aside a sale. While it is true that, where a sale is made for a price greatly disproportionate to the value of the property, courts will set aside the sale on very slight evidence of unfairness or irregularity, "such irregularities, to have this effect, must have conduced to the inadequacy of the price, or in some other way have contributed to the injury of the plaintiff." *Sargent v. Shumaker*, 193 Cal. 122, 131, 223 P. 464, 468. Nothing of that kind is shown here.

[4] The final point made by appellants is that the trustee was ineligible to act as such because both he and respondent, who was the owner and holder of the note and the deed of trust securing it, were officers of a corporation which had guaranteed the note. These facts alone would not invalidate the acts of the trustee in the absence of some showing of fraud or misconduct. *Kinard v. Kaelin*, 22 Cal. App. 383, 391, 134 P. 370; *Portola Realty Co. v. Carlston*, 32 Cal. App. 282, 285, 162 P. 899.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

6 Cal.App.2d 570

**PAULSEN v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA.**
Civ. 5367.District Court of Appeal, Third District,
California.

May 3, 1935.

Hearing Denied by Supreme Court
July 1, 1935.**1. Master and servant ☞373**

Eye injury sustained by general ranch laborer from explosion caused by dynamite cap when laborer was stirring contents of kettle over campfire which he built *held* compensable as "arising out of employment," where laborer was required by terms of employment to build campfire for purpose of preparing noonday meal, stove was not furnished, and building of campfire was customary and essential part of employment (Const. art. 20, § 21).

Injury is received "in course of employment" when it comes while the workman is doing the duty which he is employed to perform, and injury "arises out of employment" when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident to the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it "arises out of the employment." But an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment, is excluded.

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

2. Master and servant ☞417(4)

Compensation claimant *held* not precluded from reviewing findings and award of Industrial Accident Commission which denied relief, on ground that claimant in petition for rehearing did not allege reasons or grounds why findings and award were incorrect, where order denying relief disclosed that commission considered that it was bound by rule enunciated in previous case, and, there being no controversy as to facts involved, commission was informed that point relied upon by claimant was application of that rule to facts (St. 1917, p. 873, § 64 (c); Const. art. 20, § 21).

Petition by Iver Paulsen to review the findings and award of the Industrial Accident Commission of the State of California.

Order of Commission annulled, with directions.

A. L. Cowell, of Stockton, and Martin Thuesen, of Fresno, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner seeks by this writ to review the findings and award of the commission wherein the applicant was denied the relief sought.

The facts are brief and undisputed. Petitioner Iver Paulsen was employed in the capacity of general ranch laborer by H. Bigelow, who was the owner of a large band of sheep which had been pastured during the winter and early spring on lands near Friant in the county of Fresno. On April 20, 1934, the order was given to move the sheep from their winter pasturage to the summer range in the Sierra Nevada Mountains. Paulsen and another were assigned to the task of driving the sheep to the range. It was the usual custom to move the sheep along the highway until noon time, when one of the men prepared the meal while the other man held the sheep together and kept them out of the road. The first midday stopping place was the usual place where sheepmen and cattlemen had long been accustomed to stop. A truck from the Bigelow ranch had preceded the sheep and left the necessary cooking equipment, food, and water for the preparation of this meal at this point. When the sheep and herders reached this point, petitioner excavated a shallow trench approximately 100 feet from the roadway and therein built a fire of twigs and branches gathered from the nearby trees and brush. As he was seated on a stone near the fire stirring the contents of a kettle, an explosion occurred which caused some foreign matter to strike petitioner in the eye resulting in the loss of sight in the eye and its subsequent removal. The surgeon who attended petitioner found a portion of a copper shell of a dynamite cap in the eye.

A road construction crew a short time before had been engaged in working along

this highway and supposedly a cap was dropped at the place where petitioner built his fire, which, coming in contact with the heat of the fire, exploded, causing the injury of which complaint is made.

Two questions are submitted by respondent: First, whether the injury to petitioner was proximately caused by an injury arising out of and in the course of his employment; and, secondly, whether petitioner had laid a proper foundation for his petition for review.

The conclusion of the commission in this matter was based upon the rule expressed in *Storm v. Industrial Accident Commission*, 191 Cal. 4, 214 P. 874. In that case, Storm, an apprentice painter, was employed to sandpaper the wall of an unoccupied dwelling which the employer was renovating under contract. Just prior to the accident the employee lit a cigar to smoke while he worked, and a spark from the match, as he tossed it away, came in contact with a dynamite cap which in some unknown manner had been placed on a window sill in the room, which caused an explosion, resulting in the loss of his sight. How the dynamite cap came to be there was unknown. It was established it was not placed there by the employer or by any of his men, nor were dynamite caps used in connection with the work. The commission awarded compensation to Storm, but the award was annulled on the ground the injury was not proximately caused by the employment because the risk was not one necessarily incident thereto. Petitioner insists that the court in the *Storm* Case by its declaration that an injury for which compensation may be awarded must "arise out of and in the course of the employment," not only overlooked the provisions of the act that it be liberally construed but limited the scope of the act beyond the intent of the Legislature, as section 21 of article 20 of the Constitution, which authorized the establishment of a system of workmen's compensation does not require that compensable injuries must arise out of employment, but for relief from consequences of injuries "in the course of employment," an expression found also in the title of the act. Regardless, however, of the merits of this argument, we believe the present case and the *Storm* Case can be differentiated upon the facts.

[1] In the *Storm* Case the smoking of the cigar and the dropping of the match was not a part of the duty of the injured employee. In the instant case, however, petitioner was

required by the terms of his employment to build a campfire for the purpose of preparing the noonday meal for himself and his fellow employee. No stove was furnished for this purpose, and the digging of a hole in the ground and the building of a campfire therein was a customary and essential part of his employment. That there was a concealed hazard in his employment is established by the facts and the experience of petitioner. He was injured because of a condition of the instrumentality he was compelled to use in doing his work; therefore, we must conclude his injury was proximately and directly caused by his employment and arose out of it. If Paulsen had not been employed, it is possible he nevertheless might have passed that way and built a campfire in the identical spot and suffered injury, but he would not have been required to do so. The hazard to the public generally was not the same as that imposed upon petitioner as an employee whose job itself was to build a campfire upon the ground and there prepare the food for himself and his companion.

Counsel for petitioner cite a number of hypothetical situations that would change the result in the *Storm* Case. Suppose, as they say, a point of a rusty nail had been protruding from the wall but concealed from view and in the course of the sandpapering by the employee he had injured his hand on the nail and suffered infection; without doubt such an injury would be considered as arising out of the employment although it would be impossible to show how or why the nail was in that position, and its presence there might be most unusual. Or if a dynamite cap had been imbedded in the plaster and the employee had in the process of sandpapering caused the cap to explode, it cannot be claimed that the employer would not be liable because of the novelty of the situation. In each instance cited the workman would have been injured because of his employment and he would not have suffered the injury if he had not been required by the terms of his employment to do the thing which he was doing when hurt. There was nothing in the duty of Storm in the sandpapering of the walls which required him to light a cigar or drop his match where the cap lay, whereas in the present case the preparation of the meal in the manner and in the vicinity was according to the express terms of the employment.

The leading case on the question as to when an injury arises out of and in the

course of the employment is In re McNicol et al., 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, page 306, where it is said:

"The first question is whether the deceased received an 'injury arising out of and in the course of his employment,' within the meaning of those words in part 2, § 1 of the act. In order that there may be recovery the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

"It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

In the case of London, etc., Co. v. Industrial Accident Commission, 202 Cal. 239, 259 P. 1096, 1097, 54 A. L. R. 1392, in which an award was affirmed for the death of an employee as a result of the falling of the walls of a building in the Santa Barbara earthquake, it was declared that if the injury had been the direct result of the earthquake the award could not be sustained because "there must be some connection be-

tween the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury." But it was found the building in which the employee was required to work was defective and he was thereby exposed to a risk of being injured by an earthquake which was greater than that to which the public generally was exposed, and therefore his injury arose out of his employment.

We therefore believe the injury sustained by petitioner arose out of the employment and was compensable.

The second point presented by respondent is that the petition failed to properly present to the commission in his petition for a rehearing the reasons or grounds why the findings and award were incorrect. After the filing of the order of the commission denying compensation, a petition for rehearing was filed setting forth the grounds therefor as follows: (1) That the award and decision are contrary to the facts and are contrary to the evidence. (2) That the award and decision are contrary to the law. (3) That the award and decision are contrary to the law and evidence and the facts; therein failing, so it is urged, to set forth the reasons wherein the findings and award were erroneous.

Section 64 (c) of the Workmen's Compensation Insurance and Safety Act, chapter 586, Statutes of 1917 (page 873), requires that the application for a rehearing shall set forth specifically and in full detail the grounds therefor, and all objections not set forth in the application shall be deemed waived.

[2] While the petition for rehearing is not to be considered as a model nor are we to be construed as approving this procedure, nevertheless, it was obvious from the order that the commission considered that it was bound by the rule enunciated in the Storm Case, and there being no controversy as to the facts involved, the commission was informed the point relied upon by petitioner was the application of that rule to the facts. Inasmuch as the act itself enjoins upon the court and commission a liberal construction in the application of the act, we do not under the circumstances believe that petitioner should be penalized for his failure to be more specific in his application for rehearing.

For the reasons given, therefore, the order of the commission should be annulled,

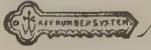
with directions to determine the amount to be awarded petitioner for the injuries sustained. It is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

there was sufficient evidence introduced to justify the judgment of the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



7 Cal.App.2d 117

KERNS v. LONG.

Civ. 8689.

District Court of Appeal, Second District,
Division 1, California.

May 22, 1935.

Appeal and error — 1010(1)

Judgment appealed from on bill of exceptions will be affirmed, where bill discloses no error in rulings complained of and sufficient evidence was introduced to justify judgment.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Benjamin F. Kerns against Elsie E. Long. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. C. Dalzell, of Los Angeles, for appellant.

Euler & Subith, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal by defendant from a judgment in an unlawful detainer action brought to recover possession and treble rents for an apartment house. The judgment of the trial court was in favor of plaintiff and decreed restoration of the premises, cancellation of the lease, and the recovery of \$1,500 and costs. This appeal is upon a bill of exceptions.

The appellant's brief does not set out or refer this court to any of the exceptions which constitute the bill of exceptions to aid this court in passing upon the questions attempted to be raised on this appeal. However, we have examined the bill of exceptions, as it is not very lengthy, and we are unable to find any error in any of the rulings complained of. Apparently

3 Cal.2d 409

MEYERFELD et al. v. SOUTH SAN JOA-
QUIN IRR. DIST. et al. (MORRIS et
al., Interveners).
S. F. 15271.

Supreme Court of California.
April 30, 1935.

Rehearing Denied May 27, 1935.

1. Waters and water courses ⇨230(6)

Powers of board of irrigation district with reference to alleged infringement of rights of owners of issue of bonds by allocation of revenues received under contract with power companies to other bond issues must be measured by law in effect at time adjustment was undertaken.

2. Waters and water courses ⇨230(4)

Where at time of authorization, sale, and issuance of bonds of irrigation district Irrigation District Act provided a complete and unequivocal method of incurring an indebtedness by issue of bonds and of raising money in payment thereof, such method was a measure of power of district board (St. 1917, p. 764, § 33; St. 1921, p. 1108, § 32).

3. Waters and water courses ⇨230(6)

Where sixth issue of irrigation district bonds was issued in form similar to bonds of prior issues and as general bonds of the district, board had no authority to prefer other bond issues over the sixth issue in allocating revenue received under contract with power companies (St. 1917, p. 764, § 33; St. 1921, p. 1108, § 32; St. 1921, p. 1110, § 61; St. 1925, p. 488, § 39; Const. art. 1, § 21).

4. Waters and water courses ⇨230(6)

Amendments to Irrigation District Act authorizing board of directors to set aside additional sources of revenue similar to those under contract with power companies to payment of designated bonds of the district *held* legislative indication that power did not theretofore exist and that some change in the law was necessary to confer it (St. 1931, pp. 778-782, §§ 32a-32e).

5. Waters and water courses ⇨230(4)

Issue of bonds of irrigation district *held* not void because of ultra vires act of district board in accepting conditional bid for bonds although purchasers of bonds were charged with notice of limitation of power of the board where bonds were regular in form, duly authorized and negotiable, and district was estopped from denying that bonds represented valid charges against the district in the same manner as other general bonds of the district.

6. Waters and water courses ⇨230(8)

Owners of issue of irrigation district bonds who were entitled to have revenue under contract with power companies allocated to such issue in same manner as other general bonds of the district had sufficient interest in revenues under the contract to entitle them to intervene in proceeding to compel payment of bonds.

On Petition for Rehearing.**7. Waters and water courses** ⇨230(6)

Ratifying statute authorizing irrigation district directors to set aside additional sources of revenue to payment of interest and principal on designated bonds *held* not to validate directors' unauthorized act in setting aside revenue from contract with power company to payment of specific issue of bonds, in view of specific provision that for such payment directors should exercise same powers as were provided in prior laws authorizing issuance of bonds, where bonds were admittedly issued in strict conformance with such laws (St. 1917, p. 764, § 33; St. 1921, pp. 1108, 1110, §§ 32, 61; St. 1923, p. 627, § 39; St. 1931, p. 376).

8. Waters and water courses ⇨230(6)

That provision in contract between power companies and irrigation district for use of dam, stipulating that revenue of contract was to be applied exclusively to payment of certain bond issue, was inoperative due to directors' lack of authority to make such provision, *held* not to invalidate contract where provisions were severable and right of district to receive money under contract was not questioned (St. 1917, p. 764, § 33; St. 1921, pp. 1108, 1110, §§ 32, 61; St. 1923, p. 627, § 39; St. 1931, p. 376).

In Bank.

Petition for mandamus by Morris Meyerfeld, Jr., and others against the South San Joaquin Irrigation District and others, in which Mary E. Morris and another intervened.

Peremptory writ denied.

McKinstry & Haber—Peirce, Coombes, and McKinstry, Haber & Coombes, all of San Francisco, for petitioners.

Nutter & Rutherford, of Stockton, for respondents.

W. Coburn Cook, of Turlock, for intervener George F. Covell.

Clark, Nichols & Eltse, of Berkeley, for intervener Mary E. Morris.

SHENK, Justice.

Mandamus to compel the respondent district and its officers to pay interest and principal on certain outstanding bonds of the district known as the sixth issue.

The district was organized under the California Irrigation District Act (St. 1897, p. 254). Thereafter, pursuant to elections duly held, the district issued and sold numerous bond issues. The first issue was dated July 1, 1910, and constituted bonds in the sum of \$1,875,000, to become due serially 1931-1940. A second issue was dated April 18, 1913, due serially 1934-1943, in the sum of \$1,170,000. A third issue was dated July 1, 1913, due serially 1934-1943, in the sum of \$790,000. A fourth issue was dated September 1, 1919, due serially 1940-1959, in the sum of \$500,000, and a fifth issue was dated November 6, 1923, due serially 1944-1963, in the sum of \$550,000. The principal sum of these first five issues was therefore \$4,885,000. An attempt is being made to adjust the foregoing five issues of bonded indebtedness by a proceeding in the federal court under section 80 of the National Bankruptcy Act (11 USCA § 303). See *Morris v. San Joaquin Irrigation District* (Cal. Sup.) 41 P.(2d) 537.

The sixth bond issue, now under consideration, is not specifically included in the plan of readjustment involved in the federal court proceeding. This sixth issue was in the sum of \$1,100,000, due serially 1927-1965, with interest at 5 per cent. per annum. These bonds were authorized at an election held in May, 1925. Of this issue, bonds in the sum of \$900,000 were sold and delivered on August 1, 1925, pursuant to a bid accepted by the directors of the district on July 11, 1925, and the remaining \$200,000 in bonds were sold and delivered in June, 1926, pursuant to a bid received on the 8th day of that month. All of the proceeds of the bonds of the sixth issue were used to construct the Melones dam on the Stanislaus river. Each block of said bonds was duly advertised to be sold. Sealed bids were invited and the bonds were issued in form the same as the prior general bonds of the district. These steps were taken in conformity with the requirements of the act as they existed when said steps were severally taken. But the bid submitted for the block of \$900,000 in bonds contained the following condition: "This bid is made upon the condition that the acceptance of this bid by the district, and its sale and delivery of said bonds to the undersigned, shall con-

stitute a contract obligation by the district, to the undersigned and all subsequent holders of said bonds, or any thereof, that all moneys paid to the district by Pacific Gas and Electric Company and by Sierra and San Francisco Power Company under that certain contract bearing date January 2, 1925, between said parties, shall be used by the district as in said contract provided." The bid for the second block of \$200,000 in bonds contained a condition in somewhat different phraseology but in legal effect the same.

The contract referred to in each conditional bid was executed under date of January 2, 1925, between the Oakdale irrigation district and the South San Joaquin irrigation district, through their respective boards of directors, as first parties, and Pacific Gas & Electric Company and Sierra & San Francisco Power Company, as second parties. The instrument recited among other things that the several parties owned and controlled certain water rights on the main and south forks of the Stanislaus river and that it was the desire of all parties to the contract to settle all claims between them as to their respective rights in and to the waters of said river and its tributaries by the construction by the districts of the Melones dam and the operation of a power plant in connection therewith by the power companies upon payment to the districts of \$5,175,000 in semiannual installments of \$64,687.50 to each district. As to the disposition by the districts of such power revenues, the contract contained this provision: "Such payments shall be used by Irrigation Districts for the following purposes: First, to pay the interest accrued upon the bonds, the proceeds from the sales of which were used to construct said Melones dam; second, to purchase and cancel, from time to time, any of said bonds outstanding, to the end that said bonds shall be retired and cancelled at the earliest practicable date; and, third, and thereafter for such other purposes as the district may desire."

After the power plant installed in connection with the dam was put in operation, the officers of the district established in its treasury separate funds called "Melones Bond Interest Fund" and "Melones Bond Redemption Fund." These funds were thereafter held and made applicable by the district board solely to the bonds of the sixth issue, and interest and principal requirements of such bonds have been met

from those special funds, except that payment of interest on said bonds for one year was made through moneys raised by tax levy in the district.

Intervener Mary E. Morris is the owner of bonds in the sum of \$98,000 of the first five issues. Together with other owners representing in all 6 per cent. of the entire first five issues, she refused to exchange her bonds for refunding bonds authorized by the electors of the district on August 14, 1931. Thereafter she commenced a proceeding in this court for a writ of mandate to compel the officers of the district, among other things, to levy an assessment sufficient to discharge the district's accrued obligations under her bonds, claiming that the district and its officers were, and had been paying obligations on the refunding bonds and ignoring her own demands until she should elect to exchange her bonds for refunding bonds, and in derogation of her rights. That proceeding was held in abeyance by this court until the termination of the federal court proceeding involving the first five issues. *Morris v. South San Joaquin Irrigation District*, supra. The petition in the *Morris* proceeding was filed on June 26, 1934. Pending the determination of that proceeding some question arose as to the authority of the district to allocate moneys on hand in the Melones bond funds exclusively to the payment of obligations on the bonds of the sixth issue. Whereupon the officers of the district withheld further payments on bonds of the sixth issue from funds admittedly on hand in the Melones bond funds and available for such payments. The present proceeding was commenced on September 29, 1934, to compel the district and its officers to discharge the obligations under the bonds of the sixth issue from funds received by the district under the contract with the power companies.

The respondents herein filed an answer admitting generally the allegations of the petition and alleging that they had withheld payments on the petitioner's bonds from the special Melones bond funds by reason of the terms of the alternative writ in the *Morris* case which required them to pay the bond obligations on the *Morris* bonds from any bond funds of the district or show cause on a day certain why they had not done so. Thereafter Mary E. Morris and George F. Covell, as the owners of bonds of the first five issues, each filed a petition in intervention herein challenging the power of the district board to accept the conditional bids

for bonds of the sixth issue, to establish the special Melones bond funds and to allocate said funds exclusively to the payment of bonds of the sixth issue. Demurrers to those petitions in intervention raise the sole question of the power and duties of the district board in the premises.

[1-3] The powers of the board with reference to the alleged infringement of the rights of the interveners must necessarily be measured by the law in effect at the time the successive challenged steps were taken. *W. B. Worthen Co. ex rel., etc., v. Kavanaugh*, 55 S. Ct. 555, 79 L. Ed. 1298, *Hershey v. Cole*, 130 Cal. App. 683, 20 P.(2d) 972, and cases therein cited. The powers and duties with respect to the sale of the \$900,000 in bonds of the sixth issue will first be considered. These bonds were sold prior to the amendment of section 39 of the act in 1925 (St. 1897, p. 267, as amended by St. 1923, p. 627). At the time of the authorization, sale, and issuance of these bonds the Irrigation District Act provided a complete and unequivocal method of incurring indebtedness by the issue of bonds and of raising money in payment of the same. Such method was the measure of the power of the board. *McCoy v. Briant*, 53 Cal. 247. No question of the regularity of the authorization of bonds of the sixth issue is presented. The proceedings inviting proposals for the sale were regular. The bonds were advertised to be sold as general bonds of the district, the same in effect as in the case of the first five issues. Sealed bids were received. Section 32 of the act (St. 1897, p. 264, as amended by St. 1921, p. 1108) required that the board should award the bonds to the highest responsible bidder. Section 33 (as amended by St. 1917, p. 764) provided: "Said bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district; and all the land within the district shall be and remain liable to be assessed for such payments as hereinafter provided."

As stated, the bonds of the sixth issue were issued in form the same as bonds of the prior issues, namely, as general bonds of the district. By section 33 of the act the law charged the lands in the district as security for the payment of said bonds. If the revenue from the power contract should fail for any reason, the lands in the district would be liable to assessment in discharge of the indebtedness. Section 67 of the act (St. 1897, p. 276) provided for the

establishment of a bond fund from which the holders of all bonds of the district had a right to demand payment. We find no provision in the act in effect when said bonds were issued authorizing the board to accept the conditional bid, nor to establish the special Melones bond funds, nor to allocate any revenues of the district exclusively to the payment of any bonded indebtedness. The petitioner asserts that the board had the implied power to do these things. The answer need not rest on general principles of law. The act itself supplies the answer in section 61 (St. 1897, p. 277, as amended by St. 1921, p. 1110), where it is declared: "The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act." It requires no argument or citation of authority to support the conclusion that, in the face of the provisions of the statute, the board exceeded its powers in the respects challenged by the interveners.

The same result must follow as to the issuance of the remaining \$200,000 of bonds sold in June, 1926. The only change in the law in the meantime and in any way applicable to the subject was an amendment of section 39 in 1925 (St. 1925, p. 488). The amendment provided that "the board of directors may in lieu, either in whole or in part, of levying the annual assessment for the payment of interest on or principal of bonds, or for any other purposes of this act, use any income or revenue of the district derived from the sale of electric power or from the sale or lease of water or the use of water for power purposes." It may readily be assumed that this amendment would permit the board to place any revenue received under the contract with the power companies in the district bond fund. When so placed, they would redound to the benefit of the landowners in the district by way of a diminution of the charges for which their lands would otherwise be liable. No possible detriment could accrue to bondholders or landowners by making the amendment applicable to all outstanding bonds of the district. But this is far from saying, as apparently contended for by the petitioners, that the amendment conferred power on the board to prefer one general bond issue over another in the allocation of such power contract revenues. On the contrary, the amendment merely authorized the board to devote revenues received apart

from a tax levy in diminution of such a levy.

[4-6] The conclusions announced are further fortified by the fact that the Legislature in 1931 (Stats. 1931, pp. 777, 778-782), amended section 32a of the Irrigation District Act (added by St. 1923, p. 628) and added new sections 32b to 32e inclusive. By these amendments and additions the board was specifically authorized to set aside additional sources of revenue, such as those under the contract with the power company, to the payment of designated bonds of the district. This specific authorization in 1931 is legislative indication that the power did not theretofore exist, and that some change in the law was necessary in order to confer it. The change in the phraseology of the law by the amendment will be deemed as intended to make a change in the law. *McDonald v. Hovey*, 110 U. S. 619, 629, 4 S. Ct. 142, 28 L. Ed. 269; *Pacific G. & E. Co. v. Ind. Acc. Comm.*, 124 Cal. App. 303, 12 P.(2d) 649; *McCarthy v. Board of Fire Com'rs*, 37 Cal. App. 495, 174 P. 402; 23 Cal. Jur., p. 778; 59 Cor. Jur. p. 896. Furthermore, section 8 of the amending statute (St. 1931, p. 783), provides that said act shall not invalidate any action of the district taken before the act becomes effective. This statute was held applicable to the refunding bonds of the Nevada irrigation district. *Mulcahy v. Baldwin*, 216 Cal. 517, 15 P.(2d) 738. It appeared that the proceedings in that case were initiated and carried to completion after the effective date of the act of 1931, and in pursuance of a plan agreed to after negotiations between the directors and the holders of the outstanding bonds of the district. It was there held that consent of the landowners in the district to the refunding plan and bonds to be issued was sufficiently evidenced by a favorable majority vote thereon. Other points were involved in the case, but no question was properly involved in that case with reference to the rights of nonconsenting and protesting holders of prior outstanding bonds as against a preference such as was here attempted to be accorded to the holders of other and like general bonds of the district issued prior to the enactment of the 1931 statute. As to the holders of outstanding bonds, it was held that they could not validly object to the issuance of refunding bonds under the particular plan later authorized by the Legislature but different from the plan formerly in force for the issuance of general bonds

of the district. Established principles of law would, of course, protect the holders of outstanding bonds in the enforcement of their contracts and they were not compelled to exchange their bonds for the refunding bonds, although they might be benefited by such exchange. No refunding plan, however, is involved here and the attempt to grant a preference to the holders of bonds of one general issue as against the holders of other bonds of the same general character would, if accomplished, grant a special privilege to one class of citizens not accorded to others similarly situated, in contravention of section 21 of article 1 of the Constitution of this state. It does not follow that the bonds of the sixth issue are void by reason of the ultra vires act of the district board in accepting the conditional bid. Although the purchasers of said bonds were charged with notice of the limitations of the power of the board (*McCoy v. Briant*, supra), the bonds were regular in form, they were duly authorized and were negotiable, and the district is estopped from denying that they are valid charges against the district the same in all respects as other general bonds of the district. See *Ham v. Grapeland Irrigation District*, 172 Cal. 611, 158 P. 207; 18 Cal. Jur. p. 876. The result is that the bonds as sold and in the hands of the purchasers take their place as other general bonds of the district, to be treated as such by the district and its officers. The first question propounded by the petitioners, viz., "Are the holders of bonds of the sixth issue exclusively entitled to the moneys so paid by the power companies under said contract?" must be answered in the negative; and the petitioners' second question, "Have the holders of bonds of the first five issues in any event any rights whatever in or to the moneys paid by the power companies under" said contract? is answered in the affirmative, inasmuch as this revenue would, in substantial part, be available in discharge of the obligations on their bonds when, as here, the payments of assessments by landowners in the district are abnormally in default, and the assessments paid are insufficient to discharge such obligations. From the answer to the second question, it necessarily follows that the interveners have a sufficient interest in the revenues under said contract as general revenues of the district to entitle them to intervene.

Other points made by the parties need not be discussed, as the foregoing is deemed determinative of the proceeding.

Since there is no duty enjoined by law on the respondents to recognize the alleged preferential rights of the petitioner, the peremptory writ is denied.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; SEAWELL, J.

On Petition for Rehearing.

PER CURIAM.

[7] On petition for rehearing it is urged for the first time that a ratifying statute of 1931 (St. 1931, p. 376) had the effect of curing the illegal act of the board of directors of the district in recognizing and complying with the unauthorized condition attached to the bid of the purchasers of the bonds of the sixth issue. The answer of the intervener urges with much merit that it is obvious from a reading of the ratifying statute that it was the purpose of the Legislature thereby to cure the irregular exercise of power and not to validate an antecedent act attempted in the total absence of power. In addition, section 2 of the act specifically provides that for the purpose of paying interest and principal on bonds of the district, the board of directors and other officers of the district shall exercise the same powers and perform the same duties with reference to the assessment, levy, and collection of taxes, and with reference to the custody of funds for payment of bonded indebtedness as were provided in the respective laws authorizing the issuance of said bonds. The laws with reference to the authorization and issuance of the bonds of the sixth issue were admittedly strictly complied with. The duties of the board of directors and other officers having charge and control of the bond fund were explicitly set forth in the laws in force at the time of the issuance of said bonds. The very terms of the ratifying statute therefore excluded the curative effect contended for by the petitioner.

[8] Also, on petition for rehearing, amici curiæ on behalf of Sierra & San Francisco Power Company and Pacific Gas & Electric Company express apprehension lest the decision in this case lay open to challenge those portions of the contract of January 2, 1925, between said corporations and the board of directors of the district relating to the use by said corporations of the Melones dam reservoir for the generation of electrical energy, and to the payments to the irrigation district for such use in ac-

cordance with the terms of the contract. No party to this proceeding has assailed the contract in so far as it provides for such use and payment, nor even intimated that those provisions of the contract are invalid or not binding on the district. The inoperative provisions of said contract purporting to bind the district to the allocation of power revenues exclusively to a particular bond issue would appear to be readily severable from, and to have no effect upon the other provisions of the contract with reference to the use of the reservoir by said corporations and to payment for such use. This proceeding involved the proper application of the power revenues after the same had been received by the district. The right and power of the district to receive the money under the contract is not questioned.

The petition for rehearing is denied.



3 Cal.2d 657

ISLAIS CO., LIMITED, v. MATHESON.*
S. F. 15216.

Supreme Court of California.
May 27, 1935.

1. Contracts ☞2

Contract obligations are determined by law in effect at time contract was made.

2. Drains ☞67

Amendment decreasing penalty on reclamation calls eliminating interest from date of delinquency to date of sale and decreasing rate of interest required to be paid on redemption *held* not valid as exercise of police power where amendment was not limited to landowners in financial distress did not provide for application of equitable principles and was unlimited as to time (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2, as amended by St. 1931, p. 762, § 6, and St. 1933, p. 1219, § 4).

3. Constitutional law ☞143

Amendment decreasing penalty on reclamation calls eliminating interest from date of delinquency to date of sale and decreasing rate of interest required to be paid on redemption *held* unconstitutional as respects bondholder of reclamation district as impairing the obligation of contract (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2, as amended by St. 1931, p. 762, § 6, and St. 1933, p. 1219, § 4; Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

4. Constitutional law ☞143

Amendment decreasing penalty on reclamation calls eliminating interest from date of delinquency to date of sale and decreasing rate of interest required to be paid on redemption *held* not sustainable as remedial enactments where their operation would materially cut down security specifically pledged by statute for payment of bonded indebtedness and thus impair a substantial right (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2, as amended by St. 1931, p. 762, § 6, and St. 1933, p. 1219, § 4; Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

PRESTON, J., dissenting.

In Bank.

Application for mandamus by the Islais Company, Limited, against Duncan Matheson, as treasurer of the city and county of San Francisco.

Peremptory writ denied.

Prior opinion, 35 P.(2d) 1051.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

SHENK, Justice.

Application for writ of mandate to compel the respondent to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Six other applications involving assessments on other tracts have been filed by the petitioner. There are no disputed questions of fact.

The petitioner is the owner of several tracts of land within the Islais creek reclamation district. On June 29, 1928, the district caused an assessment to be levied on all the lands in the district for reclamation purposes, in the sum of \$1,620,150. Thereafter the property owners in the district voted for the issuance of bonds in the amount of the assessment. These bonds

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied June 25, 1935.

were issued and sold on June 30, 1930, pursuant to the provisions of section 3480 of the Political Code, as amended in 1927. In order to meet the payments for principal and interest on the bonds maturing January 1, 1934, respondent treasurer of the city and county of San Francisco, who is ex officio treasurer of the district, made a call for an installment of the assessment. By its terms the installment became payable within thirty days from October 1, 1933, and if not paid became delinquent October 31, 1933. None of the installments on the seven tracts owned by the petitioner was paid and thereafter, on December 7, 1933, said tracts were sold by the respondent to the treasurer of the city and county of San Francisco and his successors, as trustees of the district, for the amount of the call with accrued interest thereon at 7 per cent. to the date of sale, together with a penalty of 20 per cent. computed on both the amount of the call and interest to the date of sale. The present proceeding involves the sale of tract No. 787. The sale and the computations pursuant to which this tract was sold were in accordance with the provisions of section 3480 of the Political Code, as amended in 1927 (St. 1927, p. 1449, § 2), in force when the bonds were issued and sold.

In 1931, section 3480 of the Political Code was amended (St. 1931, pp. 754, 762, § 6). By the amendment it was provided that in case of called assessments becoming delinquent, the moneys owing after the delinquency should be only the amount of the installment with a penalty thereon of 10 per cent., and the interest rate from the date of sale to the date of redemption was reduced from 12 to 7 per cent. The amendment also provided in express terms that it should "apply to all sales for delinquencies, and the proceedings had in connection therewith, on all assessments heretofore or hereafter to be levied." In 1933 the Legislature again amended said section 3480 (St. 1933, pp. 1211, 1219, § 4). The amendment of 1931 with reference to the reduction of the amount of the penalty and the interest on all assessments was re-enacted or carried into the 1933 amendment.

The petitioner, in seeking to redeem from the delinquency of the installments, tendered to the treasurer of the district the amount of the call plus a penalty of 10 per cent. thereon, in conformity with the provisions of the amendments, and made a demand upon the treasurer to accept the sum in full payment of the amount of the de-

linquent taxes. The tender was refused and these proceedings followed. The petitioner is relying upon the effectiveness of the changes made to section 3480 of the Political Code, as above referred to, to support his tender. The respondent seeks to justify his refusal of the tender upon the ground that the provisions of the amendment to said section 3480 in 1931 and as re-enacted in the amendment of 1933, decreasing the penalty on reclamation calls, eliminating interest from the date of delinquency to the date of sale and decreasing the rate of interest required to be paid on redemption, are violative of section 10 of article 1 of the Constitution of the United States, and section 16 of article 1 of the Constitution of California, forbidding the impairment of the obligation of contracts, since said amendments, it is claimed, materially alter the contract existing between the district and its bondholders. This argument is based upon the premise that at the time of the levy of the assessment and the issuance, sale, and delivery of the bonds, the 1927 amendment to section 3480 of the Political Code was in force. This amendment, as above stated, fixed the delinquency penalty at 20 per cent., and the interest rate after delinquency and prior to sale, and also the interest rate on redemption, at 12 per cent. As then amended, the section also provided that all moneys collected upon any assessment, including all interest and penalties, should be credited to the bond fund and be used exclusively for the payment of the principal and interest of the bonds issued on the assessment. Notwithstanding the existence of these various provisions of section 3480 when the bonds were issued and sold, it is the petitioner's claim that the provisions of the statute in reference to the imposition of penalties conferred no vested interest or contractual right, and in so far as the amendments affect the remedy formerly provided by section 3480, the reduction in the amount of the penalties was made by a law validly passed; that the imposition or collection of penalties for delinquency is not a part of the obligation between the district and the bondholders even though the penalties become part of the bond fund, and the amendments result in no impairment within the meaning of the constitutional provisions relied on.

[1] As between the state and its duly authorized taxing agencies, on the one hand, and the taxed property owner on the other, no question is raised or passed upon as to

the power of the Legislature, by a retroactive statute, to relax the penalties for nonpayment of the tax or to eliminate the interest from the date of delinquency to the date of sale, or to decrease the rate of interest required for redemption. But when the contract rights of third parties such as bondholders are adversely affected by the attempted retroactive statute, a different rule is applied. The obligations of the contract are determined by the law in effect at the time the contract was made. *W. B. Worthem Company ex rel. Board of Commissioners of Street Improvement District No. 513 of City of Little Rock, Arkansas et al. v. Kavanaugh*, 55 S. Ct. 555, 556, 79 L. Ed. 1298, decided April 1, 1935; *Meyerfield v. South San Joaquin Irr. Dist.* (Cal. Sup.) 45 P.(2d) 321; *Hershey v. Cole*, 130 Cal. App. 683, 20 P.(2d) 972. When the bonds involved herein were authorized, issued, and sold, the statute fixed the penalties and the rate of interest after delinquency and for redemption and set apart the sums so to be charged and collected exclusively for payment of principal and interest on said bonds. This fund then became a part of the security for the payment of the bonds. The contract rate of penalty and interest must therefore be held to persist as against an attempted retroactive statute materially affecting the fund, unless the reduction may be justified under established principles of law. The fact asserted in the respondent's behalf that the reduction in the fund caused by the statute is a substantial sum appears beyond question.

[2] The petitioner contends that the retroactive feature of the amendments of 1931 and 1933 are justifiable as a proper exercise of the police power. The argument is based mainly on the language of the urgency clause attached to the 1933 amending statute and the decision of the Supreme Court of the United States in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481.

Section 7 of the amending statute of 1933 (St. 1933, p. 1237) provided that the act should take effect immediately. In section 8 the act was declared to be an urgency measure. The statement of facts constituting the urgency relates in large part to the necessity of immediate effect in order that reclamation districts avail themselves at once of the provisions of the act in refunding bond proceedings not here involved. The statement claimed to be applicable to the outstanding bonds here involved

is as follows: "Many reclamation districts organized under the laws of this State have issued bonds for the purpose of acquiring works for the reclamation of the lands within such districts, which bonds mature in whole or in part on July 1, 1933. If this amendment does not go into effect until ninety days after the final adjournment of this session of the Legislature, such districts will be unable to take advantage of the provisions hereof prior to July 1, 1933." It may be assumed that this urgency clause was sufficient to put the statute into immediate effect. But that was unnecessary in so far as the changes in the statute here challenged were concerned, for such changes were in effect by the 1931 amendment without an urgency clause. As to said changes, the 1933 statute was a mere continuation of the 1931 law.

Again, the changes in the law, as enacted in 1931, did not purport to be made in the exercise of the police power and the argument in support of the proposition that the urgency clause in the 1933 statute made the act a police measure is unavailing, for the further reason that said clause utterly failed to measure up to the requirements of a police measure as outlined in the *Blaisdell* Case. It did not purport to limit the statute to landowners who were in financial distress; it provided no means for the application of equitable principles, was unlimited as to time, and stands as a permanent state policy. There was, therefore, no need for an urgency clause in the 1933 statute in order to put the challenged changes into effect, for they had already been in effect for nearly two years and under a statute which contained no urgency clause nor indicated otherwise that it was attempted to be passed in the exercise of the police power.

[3, 4] Many authorities are cited to us in support of the petitioner's contention that the primary purpose of imposing penalties for nonpayment of a tax is to induce property owners to pay promptly; that a penalty is a coercive measure, punitive in nature, to induce prompt payment of the tax, and not imposed for raising revenue. As establishing the general rule, these authorities may not be questioned, but here we have penalties and interest which it is made the duty of the respondent to collect and when collected are made a part of a fund specifically set apart by the statute authorizing the issue of the bonds and are to be used exclusively for the payment of principal and interest on the bonds. In this respect section

3480 in 1927 pledged the statutory penalties and interest as security for the payment of the bonded indebtedness of the district. The district must be deemed to have authorized and sold the bonds upon the tender of this security to prospective purchasers and the latter to have acquired the same on the faith thereof. To authorize the remission of such penalties and interest, in whole or in substantial part, would be a breach of faith with those who had advanced the money to the district in reliance on such security. They may not thus be deprived of their security. *Brown-Crummer Inv. Co. v. Paulter (C. C. A.)* 70 F.(2d) 184. This conclusion is reached with due recognition of the general rule with respect to the remission, reduction, and relaxation of penalties and interest incident to delinquencies under ordinary ad valorem taxing statutes [*State ex rel. Dowling v. Butts*, 111 Fla. 630, 149 So. 746, 89 A. L. R. 946; *Jones v. Williams*, 121 Tex. 94, 45 S.W.(2d) 130, 79 A. L. R. 983], and where by statute the penalties and interest are not a part of the tax [*Long Beach City School Dist. v. Payne*, 219 Cal. 598, 28 P.(2d) 663].

The respondent calls attention to and relies upon as conclusive of the matter the recent case of *W. B. Worthem Company ex rel. Board of Commissioners of Street Imp. Dist. No. 513 of City of Little Rock, Arkansas, v. Kavanaugh*, above cited, wherein the Supreme Court of the United States, Mr. Justice Cardozo being the author of the opinion, held invalid as against the owners of outstanding bonds of the district certain statutes of Arkansas extending the period of redemption of property sold for nonpayment of the assessment, levied to discharge the bond obligations, reducing the penalty from 20 per cent. to 3 per cent., reducing the interest on redemption from 10 or 20 per cent. to 6 per cent., permitting the landowner, instead of the purchasers as therefore, to remain in possession during the extended period of redemption without accountability for rents, and relaxing in some other particulars and in favor of the property owner the law in effect at the time the bonds were issued. The court stated, "To know the obligation of a contract we look to the laws in force at its making," and held that the challenged statutes were in violation of the contract clause of the Federal Constitution, and that the decision in the *Blaisdell Case* had no application to the controversy.

The petitioner herein insists that the cited *Worthem Case* is not determinative of the

present proceeding for the reason that the reductions in penalties and interest in the Arkansas statutes were but two of the many objectionable features of the law, and that the court had stated that "whether one or more of the changes effected by these statutes would be reasonable and valid if separate from the others, there is no occasion to consider." However, in cataloging the objectionable features of the statutes as the "outermost limits only," the court was at pains to point out that "we do not exclude the possibility that the bounds are even narrower."

It is true that the statute here under attack does not contain all of the objectionable features of the Arkansas enactments, but our statute does contain two of the denounced features, viz., the reduction in penalties and in interest required for redemption, and, in addition, eliminates all interest from the date of delinquency to the date of sale. We are convinced that it may not be said in reason that the changes in section 3480 in 1931 and 1933 are so unsubstantial as not materially to affect the constitutional rights of the owners of the outstanding bonds of the district.

The petitioner further contends that the amendments of 1931 and 1933 may be sustained as remedial enactments. Assuming that they have characteristics of remedial legislation, they cannot be given effect as such when their operation would, as here, materially cut down the security specifically pledged by statute for the payment of the bonded indebtedness and thus impair a substantial right. The *Worthem Case* is also decisive of this point against the petitioner.

The conclusion is that the effect of the amendments of 1931 and 1933 come within the reasoning and rule of the *Worthem Case* above cited; that said amendments cannot be justified as police power measures; that the penalties and interest attempted to be reduced and eliminated are an integral part of the fund specifically constituted by law as security for the payment of outstanding bonds; that such changes cannot be sustained on the theory of remedial legislation, that they can have no retrospective operation, and that they do not relieve the respondent from his duty to proceed in accordance with the law in force at the time the district bonds were issued. A kindred phase of the effect of similar attempted retroactive legislation with reference to reclamation district bonds is found in a recent

well-considered decision by the District Court of Appeal of the Third District, in an opinion written by Mr. Justice Plummer. *River Farms Company v. Gibson* (Cal. App.) 42 P.(2d) 95.

The peremptory writ is denied.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.

PRESTON, Justice.

I dissent.

I am unable to see that the bondholders, under the facts before us, are in anywise injured. On the contrary, to permit the landowner to redeem his property from the sale strengthens instead of weakens the security for the bonds. That the land in the hands of an owner is subject to future calls for future payments of bond interest and principal, seems not to be realized. If, as here, there has been no purchaser at the sale and as a consequence the lands are conveyed to the respondent as trustee and not redeemed, then the full title to the lands vests in the district and is never again assessed but may be sold and the net proceeds paid into the bond fund. In such case, however, the bondholder can get the net value of the property, and no more. No interest item or penalty is present and if the land is not worth the assessment, the bondholder loses. But if the owner is permitted to redeem, the full title of the property becomes liable for future payments of assessment calls and, with the present assessment paid, the likelihood of collecting the next installments is greatly enhanced. Meanwhile the bondholder has received his full complement of principal and interest. He should, therefore, gladly embrace the opportunity to have the land redeemed as provided in the amended statutes. Of course, if a purchaser is found who will pay the full penalties and interest, to the extent of such penalties the bond fund is increased and the security strengthened. But here we have no purchaser. If the owner does not redeem, there are no penalties or interest for the bond fund. It requires no prophet to predict that in this time of shrinkage in values many of these tracts of land would not sell for the amount of the full assessment. Redemption from an installment sale without penalties would strengthen the bondholders' position. I think the impairment, if any, of the obligation of the contract is so slight that it should be as negli-

gible. The object of the statute was to secure prompt payment of the calls as made, and not to create a new and additional security for the bond issue. Money received on delinquencies had to be disposed of and the bond fund was the very place to lodge it. How the bondholders are expected to profit in the long run by delinquencies, I cannot discern.



ISLAIS CO., LIMITED, v. MATHESON. *
S. F. 15222.

Supreme Court of California.
May 27, 1935.

Rehearing Granted June 26, 1935.

Drains ☞86

Ex officio treasurer of reclamation district in computing amount due on delinquent reclamation assessment had duty to add accrued interest to amount of delinquent principal in computing 20 per cent. penalty in view that statute contemplates that when installment of principal or of both principal and interest are unpaid and delinquent, stated penalty shall be added and when both are unpaid and delinquent, penalty shall be computed on both (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2, as amended by St. 1931, p. 762, § 6, and St. 1933, p. 1219, § 4).

PRESTON, J., dissenting.

In Bank.

Mandamus by the Islais Company, Limited, against Duncan Matheson, as treasurer of the city and county of San Francisco.

Peremptory writ denied.

Prior opinion, 35 P.(2d) 1055.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

SHENK, Justice.

In this proceeding in mandamus the petitioner seeks to compel the respondent to accept a certain sum of money in full payment of an assessment levied by the Islais creek reclamation district for reclamation purposes. The assessment was levied against tract No. 282, which is owned by the petitioner and is particularly itemized in the notice of sale for delinquent assessment as follows: "Tract No. 282, The Islais Co., Ltd., Installment \$1,362.38; Interest \$9.84; Penalty, \$275.44; Total, \$1,652.66."

In arriving at the amount for which this property was sold, the computations were in accordance with the requirements of section 3480 of the Political Code, as amended in 1927 (St. 1927, p. 1449, § 2), and in effect at the time the bonds to represent the assessment were issued and sold. The applicability of the amendment of 1927, in prescribing the duties of the respondent in the collection of penalties and interest on account of delinquent assessment calls, is determined in *Islais Company, Ltd., v. Matheson* (Cal. Sup.) 45 P.(2d) 326, this day filed. It was there held that the 1927 amendments governed the proceeding and that the amendments of 1931 and 1933 (St. 1931, p. 762, § 6; St. 1933, p. 1219, § 4) were inapplicable. It appears in the present proceeding that the petitioner tendered to the respondent as payment in full the installment of the assessment called upon said tract No. 282, and a penalty of 20 per cent. thereon, together with interest on said installment for a period of sixty days after the date of delinquency. The respondent refused to accept the sum tendered as payment in full, contending that the penalty computed on the unpaid installment alone was insufficient, and that the penalty of 20 per cent. should be computed on the amount of the installment plus interest thereon at the rate of 7 per cent. per annum to the date of sale. The question now presented is as to the sufficiency of the tender.

The law under which the assessments were levied and the bonds issued provided that when such bonds have been authorized to be issued on the assessments "all unpaid assessments shall bear interest at the rate of seven per cent per annum from the date of the bonds originally issued thereon until such bonds" have been fully paid and discharged, and "the interest due at any time on said unpaid assessments may be called without calling any installment of the

said assessment. The word installment as used in this section shall be construed as applying to interest as well as the principal as the case may be." The statute then provides that at least ninety days before any interest date of the bonds the county treasurer shall estimate the amount of money necessary to pay the interest and principal maturing on such interest date and shall publish a notice substantially in the following form: "Notice is hereby given that an installment of assessment (describing it) of (amount or proportion thereof including interest thereon or only for interest) is payable within thirty days from (date) by all assessed landowners of said district in the county of (name of county) to the treasurer of said county. All or any part of said installment or interest which shall remain unpaid on the (day fixed) will be delinquent, together with accrued interest thereon, with twenty per cent of such installment and interest added as penalty." The section then provides that "if any part of such installment or any interest thereon shall remain unpaid at the expiration of thirty days from the date of said notice, it shall become delinquent and twenty per cent of the unpaid amount of said installment and interest shall be added thereto and collected by said treasurer." The statutory notice of sale was also made to provide that upon delinquency in payment the property would be sold for "the amount of the installment delinquent on such parcel, the amount of interest thereon reckoned to the day of sale, the amount of said twenty per cent penalty thereon. * * *"

We find little necessity for resorting to construction in arriving at the conclusion that it was the duty of the respondent to add the accrued interest to the amount of the delinquent principal in computing the 20 per cent. penalty. The foregoing pertinent quotations from the statute plainly contemplate that when the installment of principal or of interest or of both principal and interest are unpaid and delinquent, the stated penalty shall be added. When both are unpaid and delinquent, the penalty should be computed on both. The respondent conceived this to be his duty under the statute and the regularity of the proceedings carried forward on that theory is not questioned.

The peremptory writ is denied.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.

3 Cal.2d 762

The ISLAIS COMPANY, LIMITED, a Corporation, Petitioner, v. Duncan MATHESON, as Treasurer of the City and County of San Francisco, Respondent.

S. F. 15217.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 25, 1935.

In Bank.

Application for writ of mandate to compel respondent treasurer to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Writ denied.

Prior opinion, 35 P.(2d) 1055.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

PER CURIAM.

Upon the authority of the decision in *Islais Company, Ltd., v. Duncan Matheson* (Cal. Sup.) 45 P.(2d) 326, this day filed, the peremptory writ is denied.

PRESTON, J., dissents.



3 Cal.2d 763

The ISLAIS COMPANY, LIMITED, a Corporation, Petitioner, v. Duncan MATHESON, as Treasurer of the City and County of San Francisco, Respondent.

S. F. 15221.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 21, 1935.

In Bank.

Application for writ of mandate to compel respondent treasurer to accept a cer-

tain sum of money in full payment of an assessment levied for reclamation purposes. Writ denied.

Prior opinion, 35 P.(2d) 1055.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

PER CURIAM.

Upon the authority of the decision in *Islais Company, Ltd., v. Duncan Matheson* (Cal. Sup.) 45 P.(2d) 326, this day filed, the peremptory writ is denied.

PRESTON, J., dissents.



4 Cal.2d 774

The ISLAIS COMPANY, LIMITED, a Corporation, Petitioner, v. Duncan MATHESON, as Treasurer of the City and County of San Francisco, Respondent.

S. F. 15298.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 25, 1935.

In Bank.

Application for writ of mandate to compel respondent treasurer to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Writ denied.

Prior opinion, 35 P.(2d) 1056.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

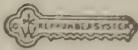
John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

PER CURIAM.

Upon the authority of the decision in *Islais Company, Ltd., v. Duncan Matheson* (Cal. Sup.) 45 P.(2d) 330, this day filed, the peremptory writ is denied.

PRESTON, J., dissents.



3 Cal.2d 764

The ISLAIS COMPANY, LIMITED, a Corporation, Petitioner, v. **Duncan MATHESON**, as Treasurer of the City and County of San Francisco, Respondent.

S. F. 15299.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 25, 1935.

In Bank.

Application for writ of mandate to compel respondent treasurer to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Writ denied.

Prior opinion, 35 P.(2d) 1056.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

PER CURIAM.

Upon the authority of the decision in *Islais Company, Ltd., a corporation, v. Duncan Matheson* (Cal. Sup.) 45 P.(2d) 326, this day filed, the peremptory writ is denied.

PRESTON, J., dissents.



4 Cal.2d 775

The ISLAIS COMPANY, LIMITED a Corporation. Petitioner, v. **Duncan MATHESON**, as Treasurer of the City and County of San Francisco, Respondent.

S. F. 15300.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 25, 1935.

In Bank.

Application for writ of mandate to compel respondent treasurer to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Writ denied.

Prior opinion, 35 P.(2d) 1056.

Rehearing denied; SEAWELL and PRESTON, JJ., dissenting.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

PER CURIAM.

Upon the authority of the decision in *Islais Company, Ltd., v. Duncan Matheson* (Cal. Sup.) 45 P.(2d) 330, this day filed, the peremptory writ is denied.

PRESTON, J., dissents.

3 Cal.2d 441

PEOPLE v. McNABB et al.

Cr. 3807.

Supreme Court of California.

April 30, 1935.

Rehearing Denied May 27, 1935.

1. Criminal law ☞590(2)

Where attorneys were jointly representing defendants jointly charged with offense, and one attorney withdrew week before trial, and defense of all defendants by remaining attorney was necessary to defense of original client, and remaining attorney had had forty-eight days to prepare for trial, denial of motion for continuance noticed three days before trial held not abuse of discretion where record showed no prejudice.

2. Criminal law ☞1186(4)

Any error arising from fact that indictment containing but one count charged convicts under life sentences with assault with deadly weapons on four persons held not to require reversal (Pen. Code, §§ 246, 954, 960, 1005; Const. art. 6, § 4½).

3. Criminal law ☞867, 923(4)

Where members of trial jury were not questioned concerning their relation to members of grand jury that returned indictment, that two qualified members of trial jury were wife and sister-in-law, respectively, of member of such grand jury held not ground for mistrial presented on last day of trial nor ground for new trial (Pen. Code, § 1071, subds. 1, 2; § 1074, subds. 1, 2, 4, 8).

4. Convicts ☞5

Evidence held to show that convicts under life sentences who assaulted with loaded revolvers and guns another convict and prison guards in concerted plan to escape assaulted such persons with "malice aforethought" with "deadly weapons" within statute providing death penalty therefor (Pen. Code, § 246).

"Malice aforethought" is a term ordinarily used in connection with the felonious killing which is murder to designate it from manslaughter. The words do not imply deliberation or the lapse of considerable time between the malicious intent to take life and its actual execution, but rather denote purpose and design in contradistinction to accident and mischance, and, as used in Pen. Code, § 246, they denote the purpose and design of the assaulting party.

[Ed. Note.—For other definitions of "Deadly Weapon" and "Malice Aforethought," see Words & Phrases.]

5. Convicts ☞5

Convicts under indeterminate sentences of not less than five years for robbery of first degree, subject to power of state board to shorten maximum term, held persons undergoing "life sentence" within statute prescribing death penalty for assault by such persons with deadly weapons, though such statute was passed before indeterminate sentences were authorized (Pen. Code, §§ 213, 246, 669, 1168).

6. Convicts ☞5

Person returned to prison as parole violator to serve consecutively two uncompleted fixed terms as well as terms of not less than five years each for conviction on two counts of robbery of first degree held "person undergoing a life sentence" within statute prescribing death penalty for assault by such persons with deadly weapons (Pen. Code, §§ 213, 246, 669, 1168).

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Ethan McNabb and William Bagley were convicted of an assault with deadly weapons while undergoing life sentences in state prison, and they appeal.

Affirmed.

William L. Southwell, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., Ralph O. Marron and William F. Cleary, Asst. Attys. Gen., and Henry E. Greer, Dist. Atty., and Harold J. Haley, Asst. Dist. Atty., both of San Rafael, for the People.

SEAWELL, Justice.

Ethan McNabb, William Bagley, Louis H. Downs, George Fredericks, and George W. Masters were accused by an indictment returned against them by the grand jury of the county of Marin on March 21, 1934, with having committed on March 12, 1934, in said county, while undergoing life sentences in the state prison of this state at San Quentin, the offense defined by section 246, Penal Code. Said section reads as follows: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." It will be noted that there is no alternative punishment.

All of the defendants, except Downs, who was allowed to sever, were placed on trial. Defendants McNabb and Bagley were found guilty by the jury and the death penalty has been imposed upon each of them. Fredericks and Masters were acquitted.

But two of the many questions raised upon the appeal taken by McNabb and Bagley may be said to merit serious consideration. However, we will give to others such consideration as they may be entitled to receive.

All of the defendants were, at the time of the alleged assaults, held on commitments for the commission of crimes which are punishable by imprisonment during the natural life of the offenders. In other words, the minimum as prescribed by statute was five years but there being no maximum fixed by law in terms of years, it is in effect a definite life term until and unless it is fixed by the state board of prison terms and paroles in due course at a lesser term of imprisonment. Verdicts of acquittal having been returned as to Fredericks and Masters, it is unnecessary to consider their status as to whether or not they were undergoing life sentences within the meaning of said section 246, Penal Code.

The only offenses involved in this appeal are robberies of the first degree, of which Bagley stands convicted of one of such offenses, and McNabb has suffered four such convictions. The penalty prescribed for robbery in the first degree is "not less than five years." Pen. Code, § 213. The maximum therefore is a life sentence, subject to be shortened by the action of the state board of prison terms and paroles, as provided by the provisions of section 1168, Penal Code. Until action is taken by said board fixing a shorter duration of imprisonment than life, it is uniformly held "that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite and therefore not void for uncertainty." *In re Lee*, 177 Cal. 690, 171 P. 958, 959, citing many supporting cases.

Defendants complain that the court abused its discretion in refusing to grant their motion for a continuance of trial made three days prior to the trial day and after a long list of jurors had been summoned to attend before the court as trial jurors on the day set at the request of counsel for the defendants. The offense was

committed on March 12, 1934. The indictment was returned March 21, 1934. On March 27, 1934, the defendants were brought into court for arraignment, but being without counsel and upon the request of each for a continuance to enable him to secure counsel, the arraignment was continued to April 3, 1934. On April 3, 1934, all of the defendants were represented by counsel, W. L. Southwell, Esquire, appearing for defendant Masters. All waived the reading of the indictment and upon their motion the time for entering their pleas was set for April 10, 1934. On April 10, 1934, the defendants joined in a demurrer to the indictment setting forth a number of objections thereto. The district attorney, by direction of the court, amended the indictment which in its original form alleged the assault to have been made with "deadly weapons, to-wit, revolvers and guns, or an instrument likely to produce great bodily harm." The above-quoted allegation was particularly assailed on the ground that the indictment did not specifically describe either the revolvers and guns as loaded weapons, or the instrument in sufficient particularity that it could be said that it was an instrument likely to produce great bodily harm if used in an assault made upon the person of another, and, further, that it was open to the construction, by the use of the disjunctive particle *or*, that more than one offense was committed. Whether the indictment was legally defective or insufficient in the respects herein specified is of no consequence inasmuch as the indictment was amended by striking out said allegation as first framed and inserting in lieu thereof, "loaded revolvers and guns." There can be no doubt that the district attorney could have made the amendment without leave of court as the defendants had not yet entered their pleas. Pen. Code, § 1008. The defendants suffered no prejudice thereby. They were arraigned on the indictment as amended. The demurrer, which we will briefly advert to hereafter, was overruled, and each defendant entered a plea of not guilty. Counsel for defendants suggested themselves that the trial be set for May 21, 1934, and the order was accordingly made. Upon joint notice of the defendants' attorneys given on April 27, 1934, an order was made May 16, 1934, permitting them to inspect all guns, revolvers, ammunition, powder, and accessories in the possession or custody of the sheriff of the county of Marin, the warden of the state prison at San

Quentin, and the district attorney of Marin county, taken from the defendants and which were to be used as evidence against them.

On May 4, 1934, W. L. Southwell made a motion on behalf of all the defendants for separate trials, which was denied except as to Downs, as above noted. On May 16, 1934, W. L. Southwell noticed a motion for May 18, 1934, to revoke the order setting said case on May 21, 1934, for trial and for a continuance to a future day. His grounds were that Nathan Coghlan, Esquire, who had appeared for McNabb, Bagley, and Fredericks to that date, had informed him that he had received no fee or retainer from any one and he could not longer continue in the case. Attorney Southwell stated to the court that the defendants other than Masters were without counsel and that he would be compelled to defend the other defendants "in order to properly defend Masters." This was true, as all of the defendants were charged with participating in the same attempt to subdue certain officers and guards of the state prison at San Quentin and thereby gain their way to liberty by force of arms in the furtherance of a conspiracy into which they had entered and promoted according to the admissions of McNabb as shown by his cross-examination and by other incontrovertible testimony and evidence in the case. All of the attorneys who had represented the several defendants acted jointly in open court in the preliminary stages of the proceedings, and it was agreed that in the absence of any one of said attorneys, any other of said attorneys present might act for and bind the absent attorneys. As a recognition on the part of the attorneys representing the several defendants that each defendant was charged with being a participant in the commission of the same offense and that all of the attorneys were united in a common purpose, the following colloquy between the court and Mr. Coghlan upon arraignment is significant:

"The Court: Ethan McNabb, have you secured counsel? A. Yes.

"Mr. Coghlan: I represent McNabb, if the Court please.

"The Court: In conjunction with other attorneys present, I believe?

"Mr. Coghlan: Yes, sir.

"The Court: Who is associated with you, Mr. Coghlan?

"Mr. Coghlan: Mr. Sullivan and Mr. Southwell, who are here present.

"The Court: Mr. Southwell?

"Mr. Southwell: Yes, sir.

"The Court: Are you ready for arraignment?

"Mr. Coghlan: Yes, Your Honor, but we will ask for time to plead."

[1] Mr. Leo Sullivan represented Downs, who was later permitted to sever at the trial. While it is true that the stipulation as to joint representation was made at the arraignment, it is also true that it was also later recognized on motions made by Mr. Southwell on behalf of all the defendants in one or two other matters. Whether the attorneys were or were not associated in a common defense of all the defendants is not as important as is the question whether Mr. Southwell, who defended McNabb, Bagley, and Fredericks, jointly charged with his acknowledged client, Masters, upon the withdrawal of Mr. Coghlan, and who from the first had taken an active part in the preparation and presentation of his client's case, was not equally well prepared to represent the defendants McNabb, Bagley, and Fredericks. He first appeared in court as attorney for Masters on April 3, 1934. The trial of all was set with his approval for May 21, 1934. He therefore had forty-eight days in which to prepare for trial. He was associated with and in conferences with Mr. Coghlan upon a number of motions affecting the interests of all of the defendants until May 14, 1934, when he was informed that Mr. Coghlan would not continue as attorney for McNabb, Bagley, and Fredericks. He then had a week in which to adjust himself to the defense of the other three codefendants. He accepted employment and moved, three days before trial, for a continuance. We are satisfied, in the circumstances of the situation, that the court did not abuse its discretion in denying the motion. That the attorney was well prepared and informed as to every possible phase of the case is borne out by the record of the trial which we have carefully read. It occupied eight trial days interspersed with three nontrial days. The transcript of the trial contains more than 1100 typewritten pages. The defense called 63 witnesses and subjected every witness called by the people to a very lengthy cross-examination. In short, the voluminous record is a formidable answer to any claim that counsel was not fully prepared for trial. The court freely granted such orders as the defense requested and granted every request made

by the defendants that was calculated to give full opportunity to interview prisoners confined in the state prison or that would otherwise aid them in the preparation of their defense. There is no merit whatever in the claim of appellants to the contrary.

[2] Appellants also urge as reversible error the fact that the indictment contained but one count and charged the defendants with an assault with a deadly weapon with malice aforethought as defined by section 246, Penal Code, made upon the persons of Fred H. Miller, Ernest Williamson, Charles Cleveland, and John Hubert Arbuckle, all of whom were guards at said prison excepting Arbuckle, a convict, who was killed in the attempted break by the discharge of McNabb's revolver, as hereafter related. The defendants were arraigned under the amended indictment filed by leave of court and their pleas were entered thereon. It neither appears from the clerk's transcript nor from the proceedings as reported in the reporter's transcript on appeal that the amended indictment was demurred to, or that it was stipulated that said demurrer might stand against the amended indictment. The demurrer was both general and special and while it states in paragraph III thereof that more than one offense was charged therein in a "manner not provided or permitted by section 954 of the Penal Code for the reasons, and all of them, alleged in paragraph I of this demurrer, and for the further reason that it is alleged, or attempted to be alleged, that the alleged assault was by revolvers and guns and also that it was committed by an instrument or instruments likely to produce great bodily injury," it nowhere specifies the respect or particular in which said allegation offends against the provisions of section 954. Said section provides:

"An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant

is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. * * *

Conceding that the demurrer directed at the original indictment did not lose its potency as to the amended indictment, it did not comply with the requirements of section 1005, Penal Code, which provides as follows: "* * * It [the demurrer] must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded." A demurrer lodged under the provisions of section 954, Penal Code, is special, and does not challenge the indictment on the ground that the facts stated do not constitute a public offense. As a matter of fact, any reference made by the joint demurrer to the uncertainty of the indictment with reference to the provisions of section 954 is of the most general and casual character, and the particular question as affected by section 954 was not so much as raised upon argument. It was not urged until the motion in arrest of judgment was made. It in no way involved a question of jurisdiction. The defendants were in fact assaulting four designated persons in furtherance of a conspiracy to overcome the guards of the prison by force and fear to the end that they might escape from prison. Of course, the admitted plot necessarily took into consideration an assault, not upon one, but upon several. That the indictment in its one and only count alleged that the assault was made upon four designated persons could not, in consideration of the plan adopted by the defendants to accomplish their purpose, have prejudiced or misled the defendants, or prejudiced their case with the jury. The conclusive evidence as to this fact is to be found in the result of the trial inasmuch as two of the defendants were acquitted, which proves that the jury was in no way confused by the form of the indictment. Section 960, Penal Code, provides: "No indictment, information, or complaint is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." Certainly the appellants suffered no prejudice by the form of the indictment. This being so,

under repeated holdings of this court, rendered in obedience to the mandate of article 6, § 4½, state Constitution, adopted November 3, 1914, the contention of appellants is of no avail. After an examination of the entire cause, including the evidence, we are of the opinion that the error complained of, if error it was, did not result in a miscarriage of justice. State Const. art. 6, § 4½.

[3] Appellants made the claim and produced evidence to support it that Mrs. Helen Walsh, the wife of a member of the grand jury which returned the indictment against the defendants, and Mrs. Walter S. Mills, her sister, were summoned as jurors and served as such at the trial. On the last day of the trial, May 4, 1934, the defendants filed a motion for an order declaring a mistrial on the ground of the relationship of said jurors to said member of the grand jury which returned the indictment. The motion seems to have been formally presented upon the motion for new trial and was made on the following grounds: First, for implied bias on the part of said jurors as defined by section 1074, subdivisions 1 and 2, Penal Code. Section 1074 of said Code provides that a challenge for implied bias may be taken for certain enumerated causes and for no other. Subdivision 1 thereof provides that a challenge may be taken by reason of "consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant." Subdivision 2 thereof provides: "Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages."

The second ground of objection to said jurors is urged under the provisions of section 1071, subdivisions 1 and 2, Penal Code, which provides: "A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either: 1. General—that the juror is disqualified from serving in any case; or, 2. Particular—that he is disqualified from serving in the action on trial."

The subdivisions of section 1074 relied upon have no application whatever to the case before us, as it is not claimed that

said jurors were related in any degree to any of the persons alleged to have been injured by the assaults or to the person upon whose complaint the prosecution was instituted. Neither does it appear that said jurors were disqualified from serving in any case or in the action on trial. Section 1074, Penal Code, enumerates all of the causes for challenges for implied bias that may be taken and it *ex industria* provides that no challenges for any other causes will be allowed. Subdivision 4 provides that "having served on the grand jury which found the indictment" constitutes a cause for challenge. If relationship within any degree of consanguinity or affinity was intended to be a cause of challenge on the ground of implied bias, the statute would have so stated. The expression of one excludes the other.

It is the law of this state that a female is placed on equal terms with males in matter of jury service. The wife is a separate person from her husband and his views or opinions concerning the performance of public duties are not necessarily hers. The two jurors objected to herein were fully examined on their *voir dire* as to their frame of mind toward the defendants and nothing appeared then or appears now to indicate that they could not and did not give the defendants a fair trial, or that they were affected by prejudice. The causes for challenge for implied bias are specifically set forth, section by section, and if counsel for the defendants desired for any reason to know if any relationship existed between said jurors and any member of the grand jury, he should have interrogated them on that subject. It is common practice for the attorney for the defendant in such cases to inquire of the prospective juror if he is acquainted with or if he has discussed the merits of the case with any member of the grand jury which returned the indictment, or if he is related or associated with any member of that body. Mere relationship to a member of the grand jury is not a disqualification nor a cause of challenge. Subdivision 8 of section 1074, Penal Code, is the only portion of said section which disqualifies a person otherwise qualified to serve from acting as a trial juror. It provides that if the offense is punishable with death, and the person entertains such conscientious opinions as would preclude his finding the defendant guilty, he must neither be permitted nor compelled to serve. All other causes may be waived. The only challenge which de-

defendants could have exercised would have been a peremptory challenge provided they had not exhausted all of such challenges. The examination of the jurors here objected to shows that they were qualified to act fairly and impartially in the matter. They did, as a matter of fact, join in acquitting two of the defendants who undoubtedly aided and abetted the principal actors in the studied plot to escape from prison.

We now come to the crux of appellants' objections against the judgment imposing the death penalty which forms the basis for most of the objections raised by demurrer and motions of various kinds. It is thus set forth in appellants' statement of questions involved on appeal: "Is a person undergoing an indeterminate sentence of five years to life, undergoing a life sentence within the meaning of section 246 of the Penal Code. * * *

[4] A brief recital of the circumstances of the assaults and the effect of the commitments under which the defendants were imprisoned is necessary to an understanding of the issue as to whether the assaults were made with malice aforethought, which is made an essential element of the offense, and also whether they were undergoing a life sentence.

McNabb is approximately thirty-eight years of age, and so far as the record discloses any information as to his life, pursued the ways of a daring, habitual criminal. He was received at San Quentin prison March 7, 1923, having been convicted on two separate counts of robbery of the first degree. On March 30, 1924, his term of imprisonment was fixed at fifteen and five years respectively. On March 9, 1927, he was released on parole. On September 6, 1929, he was delivered to the warden of the Folsom state prison upon a certified copy of a judgment of conviction under two counts of robbery of the first degree committed while he was released on parole. On December 14, 1931, he was transferred to the state prison at San Quentin, as a parole violator, with two consecutive counts of first-degree robbery and two prior convictions of robbery against him, to run consecutively with the instant term. His parole was revoked and his credits were forfeited. On March 12, 1934, while serving said sentence, he with other prisoners in a prearranged plan, made the assaults with deadly weapons, for which he and Bagley stand convicted. Bagley was at the time serving a sentence for first-

degree robbery, the maximum penalty of which is life imprisonment.

At about 8:15 a. m. on March 12, 1934, Fred H. Miller, a guard, while on his tour of inspection, was told by Downs, a prisoner, jointly charged, that two prisoners had a bottle of whisky in the electrical shop. This, of course, was a ruse. He went to the electrical shop to investigate the report and found no one in the shop but Masters who thrust a pistol to his stomach. As he stepped back, some one struck him on the head. His "sap" or black-jack was at the same time taken from his back pocket, doubtless by McNabb. He was ordered to go into the rear room by McNabb, who held in his hand a pistol which he used to enforce his order. McNabb also took from Miller his cane. Guards in the yards are not permitted to carry firearms. McNabb forced him to disrobe. McNabb put on Miller's trousers, coat, vest, and cartridge belt and holster. At this juncture, Bagley came down a stairway and entered the room and tied Miller's hands and legs with telephone wire. McNabb, Bagley, and Fredericks each tied seven or eight convicts who chanced to be in the room. While McNabb was tying a convict by the name of Arbuckle and placing him in a prone position on the floor, his pistol fell from the holster. He placed it back in the holster and as he bent over it again fell from the holster and was discharged. The bullet passed through the body of Arbuckle, fracturing the spinal vertebra in its passage, and he died a short time thereafter without regaining consciousness. McNabb and his confederates had placed the seven or eight convicts, whom they had bound, back to back on the floor. McNabb, asked in examination as a witness if he knew that Arbuckle had been shot, said he did not, but admitted that upon the request of one of the convicts who was tied that Arbuckle's head be taken off his feet, he reached down and "pushed the man's head over to one side to take the weight of the man's head off the other convict's legs that he was complaining about." He claims even then that he did not notice that Arbuckle was wounded. Others easily observed that the man appeared to be dying as he paled and blood was coursing down his neck. Those active in tying the guard and prisoners in the electrical room were McNabb, Bagley, Downs, Fredericks, and Masters. McNabb, Downs, Masters, and Bagley had guns. After the tying of the guard and prisoners, a signal "O. K." was

sounded, showing concert of action, and a ladder was quickly sawed in two, one part of which was attached to another ladder to make it of sufficient length to scale the prison walls. Downs was at the front end of the ladder and Masters was at the rear end and McNabb, wearing the guard's uniform, was leading. They were also carrying a coil of wire or rope. In proceeding down an alley to the point on the grounds where they had planned to attack the guards in the boxes and make their escape, the uniform worn by McNabb served to mislead the guards on duty at the gates and they were permitted to pass unmolested to wall No. 6. Guard Box No. 6, which is built on the wall at this point, was occupied by Guard Ernest L. Williamson. He saw McNabb, Downs, and Masters approach and halt at a point beneath his guard box. Bagley was near by at the corner of the furniture factory building. As McNabb stood almost beneath Williamson, he said to him: "Ernie, pass your rope down and pull up this coil." A rope is kept in the guard boxes for hoisting purposes. Williamson, taking him to be a guard, left his rifle in the box and stepped out on the wall with the rope in his hand. He asked McNabb what he was going to do with the ladder. McNabb instantly drew a pistol and pointing it at him, said, "Stand there or I'll kill you." He stood still for a second and then suddenly dove for the guard box in which he had his rifle and as he did so McNabb fired at him. The bullet passed over his shoulder as he dove into the box, and in its course cut through both walls of the box. Another shot took off the top of a large faucet attached to a stove and glanced into the wall of the box. Another shot went into the facing of the door near Williamson's head. Williamson fired three shots. Bagley shot at the guard in box No. 7. He also fired two shots at Guard Holmes and took three shots at Officer Fred M. Hogeboom as he was crossing the yard. Bagley fled into the coal bin and Hogeboom followed him in. Bagley pointed his pistol at a guard at close range but it misfired. Hogeboom knocked Bagley down with his cane and he came to his feet with a drawn knife or dagger, which McNabb admitted that he had furnished. Bagley was knocked down the second time. During the struggle or immediately before, he cached his pistol between sacks of coal. His knife, cartridge belt containing loaded cartridges, and knife scabbard were taken from him. At

the beginning, McNabb stood with his pistol aimed at box No. 6 and held the guard, who was warned not to expose himself, at bay for some time, when he was finally seized by Guard Robert Posthumus who made a surprise attack upon McNabb from the rear by a circuitous route and a hard struggle ensued until McNabb was overcome by a guard striking him on the head with a cane, and, with the assistance of two or three other guards, he was taken to the captain's office. Nels Peterson, a guard, was made to stand aside by McNabb, with a threat if he did not do so he would kill him. A loaded pistol, a cartridge belt containing loaded cartridges, pistol holster, and a knife with an eight-inch blade were taken from McNabb. The ladder carriers fled during the shooting. A pistol which had been discarded by one of the assailants was afterwards found which in all probability was Fredericks' weapon. The number of shots fired by McNabb, Bagley, and Guard Williamson is not certain, but quite a number were fired. That both McNabb and Bagley shot to hit their marks, there can be no reasonable doubt. Bagley was shot through the legs, but the wounds were probably minor ones.

McNabb claims to have manufactured the powder used to propel the bullets, which were dum dum, and also to have manufactured or assembled the pistols, which were unusually large and menacing in appearance. He had had some experience as a mechanic and when on the witness stand displayed considerable knowledge as to the manufacture of explosives and the mechanical parts of firearms. The explosives were of a strong dynamic quality. The suggestion of appellants that they were not mechanically suited for their purpose and were weak in destructive force is sufficiently answered by the fact that one bullet passed entirely through the body of Arbuckle fracturing the vertebra of the spinal column, and another passed through both sides of the guard's cage, and others fired by Bagley were deeply imbedded in wooden timbers which were exhibited to the jury, and needs no further comment. That the weapons were deadly was admitted by McNabb who in explaining to the jury the reason of their possession of weapons, said that upon gaining their liberty they expected to take to the mountains and the pistols were to be used in killing game for food. The nature of the assault and the preparation made by McNabb and Bagley for its commission—which had been suspected by

the officers for some time before the attack was made—also removes all doubt as to whether it was within the meaning of section 246, Penal Code. It will be noted that said section provides that every person undergoing a life sentence, "who, with malice aforethought, commits an assault upon the person of another with a deadly weapon" is subject to the penalty therein prescribed. It is not required that the assault be made with the intent to kill. The two essential elements as to the assault are malice aforethought, and the use of a deadly weapon. Malice aforethought is a term ordinarily used in connection with the felonious killing which is murder to designate it from manslaughter. The words do not imply deliberation or the lapse of considerable time between the malicious intent to take life and its actual execution, but rather denote purpose and design in contradistinction to accident and mischance. See *Bouv. Law Dict.* vol. 2, p. 2068. In our statute it is used to denote the purpose and design of the assaulting party, both of which elements are too apparent in the instant case to require further discussion.

[5,6] The only remaining question which merits consideration is the one most strongly stressed by appellants, to wit, Were appellants "undergoing a life sentence" at the time they committed the assaults? The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. This question was definitely settled by *In re Lee*, 177 Cal. 690, 171 P. 958, in 1918 and has been the pronounced law of the state since. Every person is charged with a knowledge of its existence. The fact that section 246, Penal Code, was adopted in 1901 (St. 1901, p. 6), at a time trial courts pronounced a fixed term of imprisonment, can in no wise affect the operation of the present rule of law as declared in *Re Lee*, supra. The fact that appellant McNabb was returned to prison upon two convictions of first-degree robberies committed while released on parole and was required to serve out the uncompleted terms of imprisonment by reason of breaking the terms of his parole did not suspend the force of the commitments upon which he was held. Had he been discharged or released from serving the un-

completed terms by a writ of habeas corpus or by pardon, he would have still been held as a prisoner serving a life term on said later commitments. We think the contention of appellant McNabb to the effect that a person is not undergoing a life sentence within the purpose and meaning of the law, when imprisoned on a judgment which imposes the longest term known to the law and to which nothing further may be added, because, forsooth, he is also held on a prior uncompleted sentence for years does not stand the test of reason. Section 669, Penal Code, relied upon, is not germane to the subject. It has to do with time served in terms less than life. It does not purport to say that a person is not undergoing a life sentence when delivered on a certified copy of the judgment of conviction to the warden of the state prison. The prisoner is undergoing a life sentence whatever may happen and he is held as such a prisoner by virtue of said judgment. The lawmakers had no thought of attempting to impose additional time to the longest possible span of time or of supplementing the infinite with the finite. The whole is greater than any of its parts. The proposition contended for reduces itself to an absurdity. The lawmakers had no thought of a life sentence when the section was adopted. It was dealing with consecutive terms of imprisonment for a term of years. That the appellants, one with four convictions of first-degree robbery standing against him, and the other with at least one, well knew that their life sentences would not be remitted, is strengthened by the fact that the five prisoners who engaged in the assault were all serving like sentences.

Bagley's appeal does not contain all the objections made by McNabb. The rulings made herein, however, dispose of all points presented by appellant Bagley.

Section 246, Penal Code, was enacted as a disciplinary regulation and as a means of protection to prisoners themselves against the assaults of the vicious, and also to protect the officers who are required to mingle with the inmates, unarmed. This section is fully discussed in *People v. Finley*, 153 Cal. 59, 94 P. 248, approved in 222 U. S. 28, 32 S. Ct. 13, 56 L. Ed. 75. It is applicable to the facts of appellants' case in every sense. It is also specifically held that it is sufficient to charge the offense in the language of the statute.

We have examined the court's charge to the jury and every exception taken by ap-

pellants. We find it to be full and fair and supported by the sections of the Penal Code and the decisions of this state applicable to the case.

Throughout the case the learned trial judge ruled with impartiality and upon several occasions showed very great forbearance. We find no prejudicial error in the court's rulings upon questions of the admissibility or exclusion of evidence.

The orders and judgments appealed from by appellants are and each of them is hereby affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.



3 Cal.2d 625

Ex parte MARQUEZ.

Cr. 3868.

Supreme Court of California.

May 17, 1935.

Rehearing Denied June 13, 1935.

1. Criminal law ☞982

Order granting probation is not a judgment.

2. Habeas corpus ☞113(3)

Existing judgment against one convicted of crime is not condition precedent to appeal by people from order discharging him from custody in habeas corpus proceeding (Pen. Code, § 1506, as added by St. 1927, p. 1061).

3. Habeas corpus ☞113(3)

People held entitled to appeal from superior court's order granting habeas corpus petitioner, pleading guilty of felony, discharge from custody after serving year in county road camp pursuant to order granting him 20 years' probation on condition that first 4 years be served at such camp (Pen. Code, § 1506, as added by St. 1927, p. 1061).

4. Criminal law ☞1218

Statute prohibiting commitment of person, sentenced to confinement in jail on conviction of misdemeanor or as condition of probation, for period exceeding one year, but providing for commitment to county penal farm for such period as court may order within statutory limits for offense, must be

read and construed as whole in harmony with other statutes relating to same general subject (Pen. Code, § 19a, as added by St. 1933, p. 2217; § 1203, as amended by St. 1931, p. 1633; § 1203a, as added by St. 1933, p. 1340).

5. Statutes ☞193

To ascertain meaning of statute, phrases therein must be construed in connection with associated phrases.

6. Statutes ☞194

Particular expressions in statute qualify general expressions therein (Civ. Code, § 3534).

7. Criminal law ☞1218

Statute providing that no person sentenced to confinement in jail on conviction of misdemeanor or as condition of probation shall be committed for more than one year relates solely to misdemeanor cases and cannot be invoked by one on probation under conviction of felony (Pen. Code, § 19a, as added by St. 1933, p. 2217; § 1203, as amended by St. 1931, p. 1633; § 1203a, as added by St. 1933, p. 1340).

8. Criminal law ☞982

Superior court, granting probation to one pleading guilty of rape, a felony, had power to impose condition that he serve any portion of probationary period up to maximum possible term of sentence in county road camp (Pen. Code, § 19a, as added by St. 1933, p. 2217; § 1203, as amended by St. 1931, p. 1633).

In Bank.

Proceeding by Frank Marquez for a writ of habeas corpus. From an order discharging applicant from custody in a county road camp, the People appeal.

Reversed, with directions.

Prior opinion, 40 P.(2d) 886.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

Gladys Towles Root, of Los Angeles, for respondent.

PRESTON, Justice.

The above-named defendant, Frank Marquez, was charged, by information containing four counts, with the crime of rape, a felony. He entered a plea of guilty to count 1 and applied for probation, whereupon the court ordered that proceedings as to that count be suspended and that defendant be granted probation for a period of twenty years, under condition that "the

first four years of said probationary period, defendant shall serve at the county road camp. * * *

After serving one year in the county road camp, defendant sued out a writ of habeas corpus upon the ground that "any period in excess of one year in the county jail is therefore in excess of the period of confinement in the county jail permitted by section 19a of the Penal Code." The superior court, in said habeas corpus proceeding, thereupon granted defendant a discharge from custody. The people of the state of California then undertook to exercise the right of appeal conferred upon them by section 1506, which was added to the Penal Code in 1927 (Stats. 1927, p. 1061). Said section in part reads: "An appeal may be taken to the district court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant *after his conviction*, in all criminal cases prosecuted by indictment or information in a court of record. * * *"

[1-3] Upon consideration of the cause, the honorable District Court of Appeal, Second District, Division 2, stated that against its better judgment it felt compelled to dismiss the appeal because of the following language found in a recent decision of this court upholding the constitutionality of said section 1506 (In re Alpine, 203 Cal. 731, at page 745, 265 P. 947, 953, 58 A. L. R. 1500): "It is clear from the language of said section that an appeal is only allowable *after conviction* and in those cases where there is an *existing judgment* against the defendant." It will be noted that this statement does not conform to the terminology of the statute itself, but extends the provisions thereof, in that it purports to limit the statutory right of appeal "after conviction," etc., by adding the further requirement, not mentioned in the statute, that there be also an "existing judgment against the defendant." In this cause, although defendant was guilty and had been *convicted*, having been placed on probation in the first instance there was no *existing judgment* against him. Probation is not a judgment. *People v. DeVoe*, 123 Cal. App. 233, 11 P.(2d) 26; *People v. Patello*, 125 Cal. App. 480, 13 P.(2d) 1068; *People v. Noone*, 132 Cal. App. 89, 22 P.(2d) 284; *People v. Neel*, 133 Cal. App. 332, 24 P.(2d) 230. It is obvious that the second clause of the

above-quoted sentence, to wit, "and in those cases where there is an existing judgment against the defendant," was not essential to the holding announced in the Alpine Case and crept into the decision through inadvertence. Said statement must therefore be qualified by elimination of said objectionable portion thereof. There is no doubt that the instant case represents a proper exercise by the people of their right of appeal under said section 1506 of the Penal Code.

We are thus brought to a consideration of defendant's contention that he is entitled to discharge from custody because his confinement has exceeded the period permitted by section 19a, added to the Penal Code on June 12, 1933 (Stats. 1933, p. 2217). Said section reads: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, *or as a condition of probation*, or for any reason, be committed for a period in excess of one year. If, however, any county * * * should establish a penal farm, or if there be established a State institution for long-term misdemeanants, then commitment to such penal farms or such State institution shall be for such period as the court may order within the limits prescribed by statute for the offense."

Defendant claims that this section applies to all crimes, misdemeanors, and felonies, and limits the period during which any prisoner may be confined in a penal institution, other than penitentiary or prison farm, to one year. Appellant claims that the section relates to and governs only sentences inflicted or terms of probation granted in misdemeanor cases, not felony cases; that, as defendant was convicted of a felony, his term of probation was not limited by said statute. To put it another way, defendant claims that the italicized phrase "or as a condition of probation" is unqualified by the remaining language of the section and applies to all cases, whereas appellant claims that the meaning of the phrase is so limited by its connection with associated phrases that it applies only to misdemeanor cases.

[4] The statute, of course, must be read and construed as a whole in harmony with other statutes relating to the same general subject. 23 Cal. Jur. § 161 et seq., p. 784; *Boyd v. Huntington*, 215 Cal. 473, 482, 11

P.(2d) 383. In this connection section 1203 of the Penal Code provides: "The court * * * in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine. The court * * * in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; * * * or may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither. * * * In counties * * * where road camps, farms, or other public work is available the court may place the probationer in such camp, farms, or other public work instead of in jail. * * *" Amendment approved June 12, 1931; Stats. 1931, p. 1633.

Section 1203a of the Penal Code, added just prior to section 19a, to wit, May 24, 1933 (Stats. 1933, p. 1340), provides: "* * * The courts * * * having jurisdiction to impose punishment in misdemeanor cases, shall have the power to * * * do and require all things necessary to carry out the purposes of section 1203 of this code in so far as they are in their nature applicable to misdemeanors. Any such court shall have power to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed two years; provided, that when the maximum sentence provided by law exceeds two years imprisonment, the period during which sentence may be suspended and terms of probation enforced may be for a longer period than two years, but in such instance, not to exceed the maximum time for which sentence of imprisonment might be pronounced."

[5-8] After consideration of these several sections, we are led to concur in the views of appellant as to the purport of section 19a. To ascertain the meaning of the statute, the phrases used therein must be construed in connection with the phrases with which they are associated, and the particular expressions qualify those which are general (maxim of ejusdem generis, as codified, section 3534, Civ. Code; *People v. McKean*, 76 Cal. App. 114, 243 P. 898). Thus it is clear that section 19a relates solely to misdemeanor cases and may not be invoked by this defendant who is on probation under conviction of a felony. To be more specific, the provision of section 19a that no person sentenced to confinement in county or city jail "on conviction of misdemeanor, or as a condition of probation, or for any reason" shall be committed for a period in excess of one year, merely limits the term of confinement in city or county jail in misdemeanor cases to one year, whether such confinement is the result of conviction, judgment, and sentence of imprisonment, or whether it is ordered as a condition of probation, or for any other reason. The statute places no limitation upon the term of a probationary period ordered spent in a road camp in a felony case. It follows that the power of the court to place defendant in a road camp was limited, as to period of confinement, only by the maximum possible term of his sentence. Section 1203, *supra*.

This conclusion renders immaterial appellant's further contention that section 19a has no application to cases in which the crime occurred prior to the effective date of said statute.

The order discharging the defendant is reversed, with directions to the court below to discharge the writ and remand the defendant.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.

3 Cal.2d 630

FRASER v. PAYNE et al.

KELLER v. SAME.

L. A. 14974.

Supreme Court of California.

May 17, 1935.

Rehearing Denied June 13, 1935.

1. Counties ⇐139

Superior court's order requiring county to pay for cost of daily transcript of proceeding in criminal case on impanelment of jury, wherein no challenges for cause were made or disallowed and no questioned rulings were made, and wherein there was no appeal and transcript served no purpose other than as convenience to counsel *held* abuse of discretion notwithstanding notes were transcribed at request of or with consent of parties (Code Civ. Proc. §§ 269, 274).

2. Counties ⇐139

Trial court's order compelling county to pay for cost of transcript of testimony and exhibits introduced in felony case *held* not abuse of discretion, since it was reasonable to suppose that transcript served some proper purpose (Code Civ. Proc. §§ 269, 274).

3. Counties ⇐139

County should not be compelled to pay for daily transcript which cannot be used as part of reporter's transcript on appeal.

4. Counties ⇐139

While under statute reporter may not be compelled to furnish instant transcript of his notes but is entitled to reasonable time after trial to do so, if reporter voluntarily complies with order of court requiring transcript to be furnished during trial, reporter's fees for such work may be made charge against county (Code Civ. Proc. §§ 269, 274).

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Proceedings by Stanley Fraser and Marie Keller, respectively, for writs of mandate against H. A. Payne, as auditor of Los Angeles County, and others. From judgments of the Superior Court of Los Angeles County of issuance of writs of mandate to compel payment to petitioners of reporter's fees for daily transcripts in criminal actions, respondents auditor, treasurer, and county appeal.

Affirmed in part and reversed in part.

Prior opinion, 34 P.(2d) 821.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and Fred M. Cross, Deputies Co. Counsel, all of Los Angeles, for appellants.

McAdoo, Neblett & Clagett, of Los Angeles, for respondents.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, amici curiæ.

PRESTON, Justice.

There are before us three consolidated cases in mandate against the county of Los Angeles and its auditor and treasurer, to compel payment of certain charges made by petitioners, as court reporters, for making daily transcripts ordered by the trial judge on the suggestion of the parties in two certain criminal proceedings held in the superior court of said county. Relief was given each petitioner and the writs made peremptory. From all the judgments, respondents have appealed on a transcript which shows the facts to be undisputed.

In two of the cases, Nos. 337379 and 337380, the daily transcripts ordered and furnished were merely of the proceedings taken upon impanelment of the jury in the cause of *People v. Clark*, a murder case. Some seven or eight days were consumed in selection of a jury and of such proceedings the reporters made daily transcripts of their notes, compensation for which constitutes the charges which are the subject of the above numbered of these consolidated cases. Said charges in the aggregate amount to \$1,165.32. In the criminal case the defendant was later acquitted.

[1] The question presented is that of the propriety of an order of the court for daily transcripts under circumstances and conditions such as here shown. It does not appear that upon impanelment of said jury any challenges for cause were made and disallowed or that any other questioned rulings were made. We are unable to see any legitimate use that could have been made of the transcripts. If questioned rulings were made, advantage of them could not be taken until after conviction of the defendant and only then upon a motion for new trial or on appeal. The time to order a transcript of the examination of talesmen would not seem to arise until after the trial and conviction of a defendant in a criminal case. It may be

possible that under circumstances which do not now occur to us, it would be expedient to have an immediate transcript of all or some parts of the examination of a venireman, but it is clear that a wholesale daily transcript in toto of voir dire examinations, at the expense of the county, cannot be defended. It is proper, of course, to have the reporter take notes of such proceedings, but to put the county to the expense of purchasing a full daily transcript thereof cannot be justified. The briefs indulge a liberal discussion of certain statutory provisions as well as of the inherent powers of the court relating to this subject, but as to the two cases above numbered, we hold that a discussion of these matters is unnecessary for we are compelled to state that an abuse of judicial discretion is present in both instances. The fact that the notes were transcribed at the request of or with consent of the parties does not weaken this conclusion.

[2,3] As to the third case, No. 337381, the facts are that petitioner Keller, a court reporter, made stenographic notes of the trial of a certain felony case, *People v. Hitchcock and Downing*, and made a daily transcript of three classes of items, to wit: (1) Testimony, (2) exhibits introduced, and (3) argument of defendants' counsel. The claim urged was \$172. The court allowed the items for testimony and exhibits, but disallowed the item for argument of counsel for the defense. Petitioner did not appeal from the order reducing the claim. The claim, as reduced, was for \$111.30, to pay which the court ordered a peremptory writ. The propriety of this charge, as so reduced, we cannot question except to say that a daily transcript of documents in evidence would under ordinary circumstances be an unnecessary expenditure of county funds. We cannot say there was such an abuse of discretion in this particular instance as it is reasonable to suppose that the transcript served some proper purpose. We can see no possible defense, however, for the practice of furnishing a daily transcript that cannot be used as part of the reporter's transcript on appeal.

The power of the court to order, at the expense of the county, a daily transcript of notes of the testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences of defendants in criminal cases, arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instruc-

tions given by the judge must be answered by a consideration of the provisions of section 269 of the Code of Civil Procedure, in connection with section 274 of said Code. The former section, paraphrased, reads:

"The judge * * * of any superior court * * * may appoint a competent phonographic reporter. * * * Such reporter * * * must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, taken down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested * * * and certify to the same * * * and when directed by the court, file the same with the clerk of the court."

[4] While it is true that the reporter may not be compelled under this section to furnish an instanter transcript of his notes, but is entitled to a reasonable time after the trial to do so, still that does not mean that if he voluntarily complies with the order of the court, his fees for such work may not be made a charge against the county. If the power to issue the order exists at the close of the trial, it would exist during the trial. The problem is to get the order obeyed; if this is done, the process is complete. As already noted, injury to the county ordinarily would not result until the county was required to pay for a second transcript of the reporter's notes. Section 274 of said Code clearly gives the trial judge the power to order paid by the county the sum necessary to comply with an order lawfully made by it in a criminal case under the former section. We are strengthened in our interpretation of section 269 by the recent legislative pronouncement expressly declaring said section to confer this power upon the trial court. Stats. 1933, c. 740, pp. 1802, 1803. Of course, this amendment cannot be considered as expressly conferring such authority inasmuch as it was subsequently

enacted, but it can be used as a persuasive key for the interpretation of said section.

This conclusion makes unnecessary a discussion of the question as to when the inherent power of the court may be invoked to stop the threatened encroachment upon its exclusive domain by the legislative branch of the government.

Accordingly, the judgments in cases 337379 and 337380 are reversed; the judgment in case 337381 is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.



UNION SAFE DEPOSIT BANK v. CITY OF
MENLO PARK et al.
S. F. 15237.

Supreme Court of California.
May 16, 1935.

Municipal corporations ⇨956(2), 968(2)

Tax required to be levied by city purchasing property of defaulting landowners at delinquent assessment sale, to pay amount due on improvement bonds, was directed to be limited to 10 cents on each \$100 of assessable property, and to be levied on or before next general tax levy for municipal and county purposes (St. 1921, p. 230, § 16 (a)).

In Bank.

On petition for rehearing.

Opinion amended and petition denied.

Prior opinion, 43 P.(2d) 811.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

James T. O'Keefe, Jr., City Atty., of Menlo Park, for respondents.

PER CURIAM.

It is hereby ordered that the opinion in the foregoing entitled action be, and the same is hereby, amended by striking out the last three sentences thereof and inserting in the place of the portion stricken out the following:

"We are therefore of the opinion that a mandatory duty rests upon the respondents to levy and collect a tax to meet said delinquent assessments, such tax, however, being limited to 10 cents on each \$100 of assessable property as provided in section 16 (a) of said act (St. 1915, p. 1449, as amended in 1921, St. 1921, pp. 224, 230), and that said levy be made and said tax levied on or before the time fixed by law for the next general tax levy for municipal and county purposes. As the duty to levy and collect said tax to pay the principal and interest on said bonds is a continuing obligation, the question involved herein has not become moot. American Securities Co. v. Forward, 220 Cal. 566, 32 P.(2d) 343, 96 A. L. R. 1268.

"It is hereby ordered that a writ of mandate issue directed to respondents commanding them to levy and collect said tax in the amount and at the time stated herein."

The petition for a rehearing herein is denied.



7 Cal.App.2d 127
GREENE v. VARGAS.
Civ. 9816.

District Court of Appeal, First District,
Division 2, California.
May 24, 1935.

1. Partnership ⇨53

In action to recover back salary and amount allegedly due plaintiff's assignor under agreement for purchase of one-third interest in defendant's dairy business, that books, milk permit, and similar items were in names of defendant and assignor and that assignor had joined with defendant in executing a lease held some evidence that assignor was partner with defendant and not merely an employee.

2. Partnership ⇨21

Where contract between defendant and plaintiff's assignor for purchase by assignor of interest in defendant's dairy business clearly showed intention that there should be no partnership until full purchase price was paid and that, in case of abandonment, moneys paid by assignor from his private funds should be refunded, assignee was entitled to

judgment for amount so paid by assignor where assignee abandoned business after defendant had failed for six months to pay wages provided by contract.

3. Contracts ⇨143

When parties have openly and fairly entered into an unambiguous contract, courts will not write a new contract for them.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by L. Greene against F. J. Vargas. Judgment for plaintiff, and defendant appeals.

Affirmed.

John J. Jones, of San Jose, for appellant.

John H. Machado and A. Andreuccetti, both of San Jose, for respondent.

NOURSE, Presiding Justice.

On November 1, 1927, respondent's assignor and appellant entered into an agreement whereby the former was to buy a one-third interest in the latter's dairy business for \$11,500, \$2,500 of which was to be paid by May 1, 1928, and the balance was to be paid by dividends from the business as earned. Appellant was to do all buying, collecting money, and paying bills, and was to pay respondent's assignor a monthly salary as manager. If respondent's assignor failed to live up to the contract or was not satisfactory as a manager, he was to forfeit all his interest and payments made from dividends, but all money paid on account of the purchase from his private money was to be refunded. He paid \$2,502.75 from his private funds on account of said contract. A part of this sum came from wages paid him by appellant; but he received no dividends at any time. In September, 1933, when appellant had failed for six months to pay his wages, respondent's assignor left the business, and this action is to collect both the salary due and the \$2,502.75 so paid. The cause was tried without a jury and plaintiff had judgment.

[1] Appellant argues that since the books, the milk permit, etc., were in the name of Vargas Bros. & Quadros, and since respondent's assignor joined with appellant in executing a lease, he was, in fact, a partner in the business. These items are some evidence on the issue whether a partnership in fact existed. Appellant does not contend that there is no evidence supporting the finding that no partnership existed and such contention could not be made on this record.

Appellant next brings up the point that respondent's assignor did not pay the \$2,500 which he agreed to pay by May 1, 1928. The undisputed evidence shows that the sum was fully paid within the terms of the contract, and that all payments were accepted and retained by appellant without protest as to date of payment.

When respondent's assignor left the business, it was in debt \$15,000. Appellant therefore contends there should be an accounting, basing his claim on the alleged partnership relation of respondent's assignor which the trial court found against; and, with the finding that there was no partnership, there is no basis for an accounting.

[2, 3] The contract is plain and unambiguous; it was prepared in full by appellant; and it was executed only after his repeated solicitation. On the face of the contract it is plain that the parties did not intend that there should be a partnership until the full price was paid. It is equally clear that they intended a refund to respondent's assignor, in case of abandonment, of the moneys paid from his private funds. The judgment simply enforces the obligations which the parties assumed on the well accepted principle that, when the parties have openly and fairly entered into a contract which is free from ambiguity, the courts will not write a new contract for them.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

7 Cal.App.2d 45

HILLEN v. SOULE.
Civ. 9673.

District Court of Appeal, First District,
Division 2, California.
May 16, 1935.

1. Mortgages ⇨561

Statute providing that no deficiency judgment shall lie after sale under deed of trust given to secure payment of balance of purchase price of realty *held* inapplicable to action on note secured by deed of trust, where security was exhausted by sale under another deed of trust, and no sale was had under plaintiff's deed of trust, and hence action was not for deficiency judgment (Code Civ. Proc. § 580b, as added by St. 1933, p. 1673).

2. Limitation of actions ⇨25(3)

Action on note which was secured by deed of trust *held* not barred by statute of limitations applicable to action for deficiency following exercise of power of sale in deed of trust, where power of sale under plaintiff's deed of trust was never exercised because security had been exhausted by sale under another deed of trust, and hence general four-year limitation governed (Code Civ. Proc. § 337, subd. 1, § 580a, as added by St. 1933, p. 1672).

3. Mortgages ⇨218

Payee of note which was secured by deed of trust on property sold by payee to maker *held* not precluded from recovering on note on ground that payee took conveyance of property from maker's successor in interest and that acceptance of such conveyance discharged maker from obligation on note, where record disclosed that it was neither alleged nor found that payee had ever taken conveyance from any one after selling property to maker.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by R. C. Hillen against Elizabeth S. Soule, formerly Elizabeth S. Peyton. From a judgment for plaintiff, defendant appeals.

Affirmed.

M. F. Ryan, G. F. Harrington, and B. G. Westover, all of Oakland, for appellant.

John L. McVey, of Oakland, for respondent.

SPENCE, Justice.

This action was brought upon a promissory note and was tried by the court sitting

without a jury. From a judgment in favor of plaintiff, defendant appeals upon the judgment roll.

It appears from the findings that in 1927 plaintiff was the owner of certain real property; that at said time, plaintiff sold said property to defendant, who executed two notes and two deeds of trust; that Nicolaus Ludwig was the beneficiary under the first deed of trust given to secure the sum of \$3,500 and that plaintiff was the beneficiary under the second deed of trust given to secure the sum of \$2,950; that default was thereafter made in the payment of the notes secured by said deeds of trust and that the Ludwig deed of trust was foreclosed in 1932; that as a result of said foreclosure, plaintiff's security was exhausted. Thereafter plaintiff brought this action upon his promissory note and recovered the unpaid balance due thereon.

[1] Appellant first contends that this is an action for a deficiency judgment after a sale under a deed of trust given to secure the balance of the purchase price of real property, and that such action cannot be maintained by reason of the provisions of section 580b of the Code of Civil Procedure (as added by St. 1933, p. 1673). It is a sufficient answer to state that this is not an action for a deficiency judgment. The security was exhausted by the sale under the first deed of trust and no sale was had under respondent's deed of trust. We are therefore of the opinion that the provisions of said section are inapplicable.

[2] Appellant also contends that the action is barred by the statute of limitations. In support of this contention she calls attention to those provisions of section 337, subd. 1, and of section 580a of the Code of Civil Procedure (as added by St. 1933, p. 1672) which are applicable to an action for the deficiency "following the exercise of the power of sale in such deed of trust." Again it may be pointed out that power of sale under respondent's deed of trust was never exercised because the security had been exhausted by the sale under the first deed of trust. We therefore conclude that the limitations referred to by appellant were not applicable, and that the general four-year limitation governed. Code Civ. Proc. § 337. As the action was admittedly brought within four years after the accrual of the cause, it was not barred.

[3] The final contention of appellant seems to be that respondent took a convey-

ance of the property from appellant's successor in interest, and that the acceptance of such conveyance had the effect of discharging appellant from her obligation on the note. We need not discuss appellant's conclusion or the authorities cited for the reason that appellant's premise finds no support in the record on appeal. The appeal was taken on the judgment roll and a review of the pleadings and findings shows that it was neither alleged nor found that respondent had ever taken a conveyance from any one after selling said property to appellant.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



7 Cal.App.2d 28

SIM v. WEEKS et al.
Civ. 8843.

District Court of Appeal, First District,
Division 1, California.
May 16, 1935.

Rehearing Denied June 15, 1935.

Hearing Denied by Supreme Court
July 12, 1935.

1. Physicians and surgeons ⇨14(1, 3, 4), 16

Physician cannot be held to guarantee results of his professional services, but impliedly contracts and represents, not only that he possesses reasonable degree of skill and learning possessed by others of his profession in locality, but that he will use reasonable and ordinary care and skill in application of such knowledge to accomplish purpose for which he is employed, and, if injury is caused by want of such skill, he is liable for consequences.

2. Physicians and surgeons ⇨15, 18(8)

Actionable negligence of physician consists in doing something which practitioner should not have done or in omitting to do something which he should have done, and what is proper practice in examination and treatment, or usual practice and treatment, can be established only by expert testimony.

3. Physicians and surgeons ⇨14(4)

Physician's treatment, to avoid liability for malpractice, need not have been beyond question proper, but it is required that physician should have used degree of skill and care

ordinarily possessed and exercised by members of his profession in good standing, practicing in same or similar locality.

4. Appeal and error ⇨882(16)

Defendant, in action for malpractice, could not complain of reference of plaintiff's counsel in questioning medical expert to whether treatment was proper instead of to standard of care exercised by average physician of ordinary skill in defendant's locality, where both counsel used shorter phrase in lieu of fuller definition of required standard of care.

5. Appeal and error ⇨230

Defendant, in action for malpractice, could not complain on appeal of use in testimony of medical expert of reference to whether treatment was proper instead of to standard of care exercised by average physician of ordinary skill in locality, in absence of timely objection which would have advised plaintiff as to necessity of using full legal definition in question.

6. Appeal and error ⇨1001(1)

In action for malpractice, alleged inadequacy of medical testimony referring to whether treatment was proper to justify conclusion that treatment did not satisfy standard of care exercised by average physician of ordinary skill in locality held not to require reversal of judgment for plaintiff, where deficiency was satisfied by other evidence.

7. Evidence ⇨509

In action for malpractice, plaintiff's medical expert was competent to read X-rays.

8. Evidence ⇨574

Relative weight to be given to interpretation of X-rays by medical expert as compared with contrary interpretations of roentgenologists, with claimed greater training and experience, was for jury.

9. Physicians and surgeons ⇨14(1, 4)

Physician, while not liable for mere errors of judgment nor for erroneous conclusions on matters of opinion, must use judgment and form opinions of one possessed of knowledge and skill common to medical men, practicing in same or like community, and that he may have done his best is no answer to malpractice action.

10. Physicians and surgeons ⇨14(4)

Whether errors of judgment will make physician liable depends on whether he has treated case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession.

11. Physicians and surgeons ⇨18(9)

Negligence of physician in actual performance of treatment after its method was chosen over others is for jury.

12. Physicians and surgeons ⇨16

Physician could not avoid liability for malpractice in treatment of broken arm because he exercised his best judgment as to method to be adopted in bandaging arm, if he was negligent in performance of chosen method.

13. Physicians and surgeons ⇨18(9)

Evidence as to negligence of physician in treatment of broken arm *held* for jury, notwithstanding treatment was approved by five medical experts and disapproved only by plaintiff's sole expert (Code Civ. Proc. §§ 1844, 2061, subd. 2).

14. Evidence ⇨506

When result may or may not be occasioned by malpractice, medical witness invades province of jury when permitted to go beyond stating that malpractice could, and in saying that it did, occasion result.

15. Evidence ⇨506

Expert should not be permitted to express opinion as to ultimate fact which is to be decided by jury.

16. Evidence ⇨571(9)

In action for malpractice, medical testimony *held* not insufficient to warrant conclusion that ischemic paralysis was caused by tightness of bandages, on theory that opinion was based on expert's speculative interpretation of radiographs, whereas actual measurements made on radiographs demonstrated that there was no undue pressure from bandages, where measurements amounted only to interpretation by defendant's roentgenologist of degree of flexion, which raised conflict for jury, and opinion was not based exclusively on reading of X-rays.

17. Evidence ⇨571(9)

In action for malpractice, medical testimony *held* not insufficient to warrant conclusion that ischemic paralysis was caused by tightness of bandages, on ground that opinion was based on three radiographs, one of which defendant's roentgenologist testified was distorted, since such testimony went merely to weight and credibility of opinion.

18. Evidence ⇨571(9)

In action for malpractice, medical testimony *held* not insufficient to warrant conclusion that ischemic paralysis was caused by tightness of bandages, because expert later qualified his own opinion by admitting that paralysis might have developed pathologically and from internal pressure, which was opinion of other experts, since conflict raised question for jury.

19. Appeal and error ⇨930(1)

After verdict, all circumstances of case, together with any reasonable inference which

may be drawn therefrom, will be marshaled in support of judgment.

20. Negligence ⇨134(11)

Circumstances need not establish defendant's negligence as proximate cause of injury with such absolute certainty as to exclude every other conclusion, but it is sufficient if there is substantial evidence on which to reasonably support judgment.

21. Physicians and surgeons ⇨18(8)

In action for malpractice, evidence *held* to support conclusion that ischemic paralysis was caused by trauma arising from treatment and to negative conclusion that paralysis developed pathologically and from internal pressure.

22. Evidence ⇨359(4)

X-ray photograph, when verified by proof that it is a true representation, is admissible.

23. Appeal and error ⇨970(2)**Evidence ⇨382**

Whether enlargement of photographs already in evidence are correct representations is question for trial court, and court's ruling will be sustained, unless it is apparent that there has been abuse of discretion.

24. Evidence ⇨359(4)

In action for malpractice in treatment of fractured arm, enlarged X-ray photographs *held* admissible, notwithstanding enlargement exaggerated and distorted alignment of bones, where there was no issue as to reduction of fracture.

25. Trial ⇨296(8)

In action for malpractice, instruction that jury must decide medical matters according to preponderance of testimony *held* not erroneous as denying verdict to defendant if his expert testimony balanced that of plaintiff and imposing on defendant greater burden of proof than was required, in view of other instructions correctly defining preponderance of evidence.

26. Physicians and surgeons ⇨18(10)

In action for malpractice, instruction charging defendant with duty of using skill of reasonably learned, skillful, careful, diligent, and prudent physician in locality, and with duty of conforming to prevailing standards in such locality, *held* not erroneous as imposing higher standard of care than was required, which was only skill and learning of average member of his profession in good standing, since word "average" meant same as "reasonable" and "ordinary."

[Ed. Note.—For other definitions of "Average," "Ordinary" and "Reasonable," see Words & Phrases.]

27. Physicians and surgeons ⇨18(11)

\$12,500 to six year old girl suffering ischemic paralysis of left arm caused by malpractice in treatment of fracture, which caused arm to wither and become useless and hand to contract into a claw, held not excessive.

28. Damages ⇨127

For purpose of comparing verdicts to determine whether damages are excessive, amounts of verdicts in previous cases must be adjusted upwards to compensate for decrease in purchasing power of dollar.

TYLER, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Sally Sim, a minor, by Kenneth Sim, her guardian ad litem, against Alanson Weeks and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Rehearing denied; TYLER, P. J., dissenting.

Hartley F. Peart, Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco, for respondent.

GRAY, Justice pro tem.

Respondent, Sally Sim, aged six years, broke her left arm, just above the elbow, while playing with other children at a home where her parents were visiting friends. Her parents promptly rushed her to the nearest hospital, where the appellant, Dr. Alanson Weeks, as a physician and surgeon, treated her injury. He correctly diagnosed this injury as a supracondylar fracture of the lower end of the humerus of the left arm. Following his diagnosis, he first manipulated the arm to bring the displaced bones into normal position and then put up the arm with the elbow joint acutely flexed and with the supinated forearm bandaged to the upper arm by two-inch adhesive tape, and fastened to the chest in a sling of such tape. His services then ended, and the child was taken home. During the night the arm swelled, causing pain, which made the child restless. The next morning, the parents

being alarmed by the continued swelling of the arm and the pain suffered by the child, consulted the defendant Dr. Edward Salomon, also a physician and surgeon, and, at his suggestion, immediately had X-ray pictures of the arm taken. That afternoon Dr. Salomon examined the arm and the X-rays, but did nothing. Later in the afternoon appellant, after a communication from Dr. Salomon, inquired of the mother by telephone as to the child's condition, but gave no directions. That night, the arm having continued to swell, the mother, on her own volition, partially cut the bandage. The next afternoon, pursuant to Dr. Salomon's advice, she released the bandage and put the arm in a loose sling. On the third day after the injury, at Dr. Salomon's arrangement, a specialist examined the arm at another hospital and found that ischemic paralysis, caused by the impairment of the blood circulation, had developed in the arm. As a result of this paralysis, the structure and function of the arm became seriously damaged. Thereupon respondent sued both doctors to recover damages for their alleged negligence. After trial, the jury returned its verdict exonerating Dr. Salomon and awarding damages against Dr. Weeks in the sum of \$12,500. The latter appeals from the judgment entered thereon, assigning as grounds for reversal (1) the insufficiency of the evidence to establish (a) either that he was negligent, (b) or that the injury was a proximate result of his negligence; (2) erroneous admission in evidence of an enlargement of the X-ray pictures; (3) erroneous instructions; and (4) excessive damages.

[1,2] It is well settled that a physician and surgeon cannot be held to guarantee the results of his professional services. "However, it is equally well settled that in undertaking a treatment of a patient the practitioner impliedly contracts and represents, not only that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and that, if injury is caused by a want of such skill or care on his part, he is liable for the consequences which follow. *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128; *Nelson v. Painless Parker*, 104

Cal. App. 770, 286 P. 1078; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Ley v. Bishopp, 88 Cal. App. 313, 263 P. 369; Patterson v. Marcus, 203 Cal. 550, 265 P. 222. Furthermore, it is held that actionable negligence in cases of this kind consists in his doing something which he [the practitioner] should not have done, or in omitting to do something which he should have done; and that what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts and can be established only by their testimony. Perkins v. Trueblood, supra." Roberts v. Parker, 121 Cal. App. 264, 267, 8 P. (2d) 908, 909.

There was no issue as to appellant's diagnosis or reduction of the fracture. Respondent made no claim that appellant did not possess the requisite skill and learning, but her sole contention was that he was negligent in the application of that skill and learning to the treatment of her injury. All the medical experts agreed that the usual and proper treatment for such a fracture was to put up the arm with the elbow joint flexed, the supinated forearm being fixed to the upper arm, fastened to the chest in a sling, and that, on account of the danger of ischemic paralysis, it was improper to bandage too tightly or to flex the elbow joint too much. They were also in accord that, in determining the extent of the flexion and the tightness of the bandage, due allowance must be given to the swelling of the arm normally following such an injury. Respondent asserted, and appellant denied, that he was negligent in flexing the arm so acutely and in bandaging it so tightly as to impair the circulation. To establish that the treatment in this regard was not usual or proper, when measured by the requisite standard, and hence negligent, under the foregoing rule, respondent introduced the testimony of but one medical expert, which was based on a study of the X-rays and an examination of respondent, preparatory to testifying, and was given in response to hypothetical questions. Appellant's claim that the evidence is insufficient to establish his negligence consists of an argument that such expert's testimony is insufficient for that purpose, not in its entirety but in certain vital particulars. Hence it will be necessary to review only such of his testimony as is criticized.

[3-6] Much of the force of the argument is derived from overemphasis of isolated portions of his testimony and by consideration of an answer detached from its question. For instance, in reply to a question as to whether the position of the arm as shown by the X-rays was recognized as proper by physicians and surgeons in San Francisco for the placement of an arm in reduction, he answered that it was not the proper position. Likewise, when asked whether the bandaging as described in a hypothetical question was recognized by physicians and surgeons in San Francisco as proper for the reduction of such fracture, he responded that it was not the proper way. Appellant argues therefrom that the witness was stating his personal opinion as to the propriety of the treatment rather than as to the standard of care exercised by the average physician and surgeon of ordinary skill in his locality. If the adjective "proper" is not overstressed and the verb "was recognized" is not eliminated, as appellant impliedly does, it is obvious that the witness was speaking of what physicians and surgeons recognize as proper. Again, as to other questions and answers worded substantially as the above, appellant argues that they are wholly inadequate to justify a conclusion that appellant's treatment did not satisfy the standards of care exercised by the average physician and surgeon of ordinary skill in this locality, since proper treatment implies that no error shall be committed in the treatment. As appellant contends, the law does not require that his treatment should have been at all events and beyond question proper, but it does require that he should have used the degree of skill and care ordinarily possessed and exercised by members of his profession in good standing, practicing in the same or similar locality. Hesler v. California Hospital Co., supra; Markart v. Zeimer, 67 Cal. App. 363, 227 P. 683. Since the record discloses that both counsel used the shorter, criticized phrase in lieu of the fuller, legal definition of the required standard of care, appellant cannot now complain. Reynolds v. Struble, 128 Cal. App. 716, 18 P. (2d) 690. In absence of a timely objection, which would have advised respondent as to the necessity of using the full legal definition in her question, appellant cannot now question the sufficiency of the testimony. Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42

P. 983; *Spear v. United Railroads*, 16 Cal. App. 637, 117 P. 956. Assuming the correctness of appellant's contention, the inadequacy of this testimony is not vital, since its deficiency is satisfied by other evidence, as stated in respondent's brief. *Rankin v. Mills*, 207 Cal. 438, 278 P. 1044.

[7,8] Respondent's sole medical expert interpreted the X-rays as showing that the elbow joint had been flexed as far as it could possibly go under pressure, that the forearm had been placed against the upper arm as close as it would go without being heavily forced, and that the bandage was too tight. Two roentgenologists, on appellant's behalf, read the X-rays as showing a degree of flexion usually used in this type of reduction, and no undue pressure from the bandages. One of these specialists interpreted the degree of flexion to be 45 degrees, but did not, as appellant claims, give this as an actual measurement. Therefore there is no basis in fact for appellant's argument that the interpretation of respondent's expert, based on an estimated greater degree of flexion, must fall in face of an actual measurement of a lesser degree of flexion. As a physician and surgeon, respondent's expert was competent to read the X-rays. See cases collected in note, 77 A. L. R. 946, 955. The relative weight to be given to his interpretation as compared to those of the roentgenologists, with claimed greater training and experience, was a matter confided in the jury.

[9-12] In his deposition, as summarized by him, appellant testified in part as follows: "I manipulated the bone to bring the ends of the bone into place, and *I felt confident it was in very good position*; the manipulation consisted in pulling the lower fragment down and back in the direction in which it had gone when it was broken and then tipping it over the lower end of the upper fragment and turning the arm up into a flexed position, and *at all times I had it the way I thought best*; * * * I did not flex the child's arm as far as it would go, *but I had it up as far as I thought necessary to keep the bone in position*; it was short of full flexion, short of too much pressure on the soft tissue so that the hand could have been moved toward the shoulder three inches more; it could have been pushed up three inches more, but the child couldn't move it; no force was necessary to accomplish this flexion; * * * adhesive

strap was used in the form of a sling in which the forearm hung; it in no way went around either the forearm or the upper arm, and it went around one side of the forearm and around behind the upper arm; it was slung from the wrist, beginning at the hand and continuing two inches and no more toward the elbow; and opposite that on the upper arm was where the bandage went around, just as a sling." (Italics ours.) Similar, but not as favorably worded, testimony was given by him at the trial. Appellant argues that, since he was called upon to exercise, and did exercise, his best judgment as to the method to be adopted in bandaging the arm so that the broken bones would not again become displaced, he is not chargeable with any error, resulting in injury. But the present charge is not that he was negligent in his choice of method, but that he was negligent in the performance of the chosen method. While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing in the same or like community, and that he may have done his best is no answer to an action of this sort. *Reynolds v. Struble*, supra. "It has been broadly held that a physician or surgeon is not liable for an honest error or mistake in judgment. However, a limitation of this broad rule is recognized in cases that exempt from liability for errors of judgment only where there is a reasonable doubt * * * as to the proper course to be followed, or where good judgments may differ. Another limitation of the broad rule above stated is found in cases that hold a qualified physician is not liable for an error of judgment if he applies ordinary and reasonable skill and care * * * or keeps within recognized and approved methods or the common practice; * * * Thus, where there is more than one recognized and approved method of treatment applicable to the case, a physician or surgeon is not liable for an honest mistake of judgment in selecting a method. Whether errors of judgment will or will not make a physician or surgeon liable in a given case depends * * * on whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession." 48 C. J. 1127. A charge-

of negligence in a choice of treatment is refuted, as a matter of law, by showing that a respectable minority of expert physicians approved the method selected. But, where a physician is charged with negligence in the actual performance of a treatment, after its method was chosen over others, evidence tending to show such negligence presents a case for the jury. *Swanson v. Hood*, 99 Wash. 506, 170 P. 135. A physician cannot, as a matter of law, defeat an action for malpractice by testimony that, possessing ordinary knowledge and skill, he determined on the course pursued in the exercise of his best judgment, if he did not use ordinary care. *Kimble v. Roeder*, 115 Neb. 589, 214 N. W. 1.

[13] Appellant produced five medical experts, in addition to himself, each of whom, it may be conceded for present purposes, fully approved his treatment, and therefore expressed opinions as to its propriety contradictory to that of respondent's sole expert. From this premise he fallaciously argues that he is not chargeable with negligence, since the opinions of many experts support, and the opinion of but one opposes, his treatment. "The adoption of this view would be to change the rule of liability so as to hold a surgeon responsible only when his acts evidence a want of skill below that of the most unskillful surgeon whom the defendant might be able to produce. The jury must judge of the skill and qualifications of the expert witnesses, as well as of the defendant in the action, and it is for the jury to say, upon all the evidence, what treatment amounted to negligence, under the rule of skill required." *Hewitt v. Eisenbart*, 36 Neb. 794, 800, 55 N. W. 252, 254. The difference in the number of witnesses is a false quantity, since "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact" (Code Civ. Proc. § 1844), and since the jury "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number" (Code Civ. Proc. § 2061, subd. 2).

[14, 15] As to his second assignment, appellant argues that the testimony of respondent's expert is insufficient, in four particulars, to warrant the conclusion that the ischemic paralysis was caused by the tightness of the bandages. He gives no separate consideration to the flexed posi-

tion of the elbow as a cause of injury nor to the sufficiency of other evidence to establish a causal connection between the treatment and the paralysis. To concentrate undivided attention to his argument, it will be discussed on the basis propounded by him. First he asserts, without reviewing such expert's testimony, that his opinion as to the cause of the paralysis was an invasion of the province of the jury. The following excerpt from the well-reasoned case of *DeGroot v. Winter*, 261 Mich. 660, 247 N. W. 69, relying in part upon appellant's citation, correctly states the limitations within which an expert may give an opinion as to the causal connection between the treatment and the injury in a malpractice case. "Upon the issue of whether defendants were guilty of malpractice by commission or omission, the expert could and did give opinion evidence. Upon the ultimate issue of whether plaintiff's condition resulted solely from malpractice, the expert should not have but did give his conclusion as to a fact, not necessarily following malpractice, and in dispute. When a result may or may not be occasioned by malpractice, an expert medical witness invades the province of the jury when permitted to go beyond stating that it *could* and in saying that it *did* occasion the result. Such an opinion is but the private judgment of the witness and not competent evidence. Whether the alleged malpractice could occasion the result complained of was one of science only. Whether malpractice did occasion such result was in controversy, and therefore not one of mere science. When the facts are admitted and not in dispute, the question, if answered, may be considered one of science. But, when a result could have been occasioned by one of two or more causes, the ultimate fact of which cause occasioned the result is for determination by the jury, and a medical expert may not, in case of conflicting evidence, invade the province of the jury and testify that the result was in fact occasioned by one cause only." An expert should not be permitted to express an opinion as to an ultimate fact which is to be decided by the jury. *Shafter v. Evans*, 53 Cal. 32; *People v. Westlake*, 62 Cal. 303; *Conner v. Stanley*, 67 Cal. 315, 7 P. 723; *Redfield v. Oakland C. S. Ry. Co.*, 112 Cal. 220, 43 P. 1117; *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 45 P. 833; *Reclamation Dist. No. 537 v. Burger*, 122 Cal. 442, 55 P. 156; *People v. Overacker*, 15 Cal. App. 620,

115 P. 756; *Giberson v. Fink*, 28 Cal. App. 25, 151 P. 371. However, appellant has not pointed out, nor has a reading of the expert's testimony disclosed, any transgression of this rule.

[16-21] Secondly, appellant claims that the opinion of respondent's expert was based upon his speculative interpretation of three radiographs, whereas actual measurements made upon the radiographs demonstrated that there was no undue pressure from the bandages. As previously stated, the so-called actual measurements amounted to no more than an interpretation by appellant's roentgenologist of the degree of flexion, which raised a conflict of which the jury were the exclusive judges. Since his opinion was not based exclusively on a reading of the X-rays, appellant's assumption of fact, even if correct, would not necessarily destroy such opinion in its entirety, but, at most, would present a question of its weight and credibility for the jury's decision. Thirdly, appellant contends that the expert's opinion was based upon the three radiographs, one of which his roentgenologist testified was distorted. Such testimony merely presented a matter for the jury's consideration in passing upon the weight and credibility of such opinion. Fourthly, appellant states that respondent's expert later qualified his own opinion by admitting that ischemic paralysis might have developed pathologically and from internal pressure, and the other experts were of the opinion that pathology and not trauma caused the ischemic paralysis. This contention is somewhat inconsistent with the first, for there he argued that respondent's expert was too positive in his opinion that there was but one cause of the injury and here admits other possible causes. The conflict between the opposing opinions raised a question, committed to the jury for decision, and its verdict thereon cannot be disturbed for lack of evidentiary support, unless it is without substantial support in the evidence. *Walter v. England*, 133 Cal. App. 676, 24 P.(2d) 930.

"After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof. As

the court says in the case of *Dimock v. Miller*, 202 Cal. 668, 671, 262 P. 311, 312:

"“If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.”

"It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. *Ley v. Bishopp*, 88 Cal. App. 313, 316, 263 P. 369.” *Barham v. Widing*, 210 Cal. 206, 215, 291 P. 173, 177.

The nature and extent of the injury to the tissues, muscles, and blood vessels of respondent's arm received at the time of fracture, and the progressive development of injury to those parts following appellant's treatment, not only support the jury's conclusion that paralysis was caused by trauma, arising from the treatment, but negative a conclusion that the paralysis developed pathologically and from internal pressure. A similar verdict as to a similar injury under similar conflicting opinions was sustained in *Van Der Bie v. Kools*, 264 Mich. 468, 250 N. W. 268.

[22-24] Appellant next assigns as prejudicial error the admission in evidence, over his objection, of enlarged photographs of the X-rays. "While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, the rule in regard to the use of ordinary photographs on the trial of a cause applies to photographs of the internal structure and conditions of the human body taken by aid of X-rays, and such a photograph, when verified by proof that it is a true representation (citing *Kimball v. Northern Electric Co.*, 159 Cal. 225, 113 P. 156, among others), is admissible in evidence"—citing *Bruce v. Western Pipe, etc., Co.*, 177 Cal. 25, 169 P. 660, among others; 22 C. J. 916. See, also, note in 77 A. L. R. 946. "It is no objection to the admissibility of a photograph that it is enlarged, showing the subject or object magnified, where this does not have a tendency to mislead.

Photographs of instruments already in evidence which are so enlarged as to make the proportions plainer and to illustrate the testimony of the witnesses may go to the jury in the same way as would a magnifying glass or microscope." 22 C. J. 918. It is for the trial court to determine from the evidence before it whether enlargements of photographs already in evidence are correct representations thereof, and its ruling will be sustained unless it is apparent that there has been an abuse of discretion. *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908. Conceding that the enlargements exaggerated and distorted the alignment of the bones, appellant was not thereby prejudiced, since there was no issue as to the reduction of the fracture. No other claim is made that the enlargements had a tendency to mislead.

[25, 26] It is further urged that the jury was misled to appellant's prejudice by erroneous instructions respecting preponderance of evidence and negligence. The first criticism is based upon several statements in two instructions to the effect that the jury must decide medical matters according to the preponderance of the medical testimony. From this he argues that he was denied a verdict if his expert testimony balanced that of respondent, and hence a greater burden of proof than required was imposed upon him. Other instructions correctly defining preponderance of evidence told the jury, just as he argues it should have been, that, if the evidence was equally balanced on any issue, the jury must find against respondent on that issue. The criticized instructions on negligence charged appellant with the duty of using the skill and learning of a reasonably learned, skillful, careful, diligent, and prudent physician and surgeon in this locality and with the duty of conforming to the prevailing standards in such locality. These instructions, he asserts, imposed upon him a higher standard of care than the law requires, since he was only required to use the skill and learning of the *average* member of his profession in good standing in the particular locality. The word "average," as used in *Say v. Barber*, 202 Cal. 679, 681, 262 P. 312, upon which he relies as authority, means the same as "reasonable" and "ordinary." *Whitesell v. Hill* (Iowa) 56 N. W. 894. "In order to determine

who will come up to the legal standard indicated, we are not permitted to aggregate into a common class the quacks, the young men who have no practice, the old ones who have dropped out of the practice, the good, and the very best, and then strike an average between them. This method would evidently place the standard too low." *Holtzman v. Hoy*, 118 Ill. 534, 536, 8 N. E. 832, 59 Am. Rep. 390. There is no merit in either criticism.

[27, 28] The injured arm was the one most frequently used by respondent. The treatment aggravated the swelling normal to such fracture and created blood blisters at the wrist and elbow. For weeks the arm was swollen and the tissues at the wrist and elbow were infected and matured, with sloughing. During this period respondent suffered intense pain with attendant loss of sleep. She was treated by massage and physiotherapy for about six months with slight improvement. The condition of the arm at the time of trial (one and one-half years after the injury) was permanent, with no possibility of improvement by medical treatment. The muscles had wasted and hardened so that she could flex her elbow only 90 degrees, her thumb 10 degrees, and her fingers were powerless. Without a mechanical device, the hand contracted into a claw. The injury to the arteries had so curtailed the blood supply to the bones and tissues that the arm had practically stopped growing and was at time of trial one-half inch shorter and one-third less in circumference than the other. The withered arm with its clawlike hand, especially because of her sex, has caused her humiliation and mortification, which will increase progressively through her life. Functionally, the arm is of but little use, and, for the sake of appearance, its removal probably would be an aid.

Although the lack of an exact rule of admeasurement and the difference in the evidence of each case makes a comparison of awards for similar injuries of doubtful value, it is interesting to note that in other jurisdictions verdicts for similar injuries in amounts larger than the present one have been held to be not excessive. 17 C. J. 1101. In this state the following cases have sustained the following amounts for similar injuries, to wit: *Perry v. Angelus Hospital Association*, 172 Cal. 311, 156 P. 449 (decided March 14, 1916), \$11,500; *Sally v. W. T. Garratt & Co.*, 11

Cal. App. 138, 104 P. 325 (decided August 21, 1909), \$7,500; *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 P. 913 (decided February 9, 1923), \$8,363. For purpose of comparison, these amounts must be adjusted upwards to compensate for the present-day decrease in the purchasing power of the dollar. *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381; *Rowe v. Rennick*, 112 Cal. App. 576, 297 P. 603. The amount of the verdict was approved by the trial judge in denying the motion for a new trial. Considering the nature of these injuries and their permanent character, together with the suffering already caused to the respondent and the present and future humiliation and mortification endured and to be endured by her, it cannot be said that the verdict was so excessive as to warrant the conclusion that it was the result of passion, prejudice, or corruption on the part of the jury. *Perry v. Angelus Hospital Association*, *supra*; *Griffith v. Oak Ridge Oil Co.*, *supra*.

The judgment is affirmed.

I concur: CASHIN, J.

TYLER, Presiding Justice.

I dissent.

The pivotal question presented by the appeal is whether defendant's treatment of the child came up to the standard exercised by the average physician of ordinary skill in the locality. It is appellant's contention that the judgment lacks evidentiary support, for the reason it was not established that the treatment of the fracture by Dr. Weeks did not satisfy the standards of care exercised by the average physician and surgeon of ordinary skill in the locality, or that Dr. Weeks did not exercise his best judgment in adopting an improved method of treatment. As pointed out in the main opinion, it is not claimed that appellant did not possess the required skill and learning; the sole contention being that he was negligent in the application of his skill in the treatment of the injury.

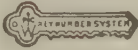
Appellant, as the record shows, has a very high professional standing. He is clinical professor of surgery at the University of California, and he has received the distinguished service medal for good surgery work during the World War. There is evidence to show that after the little child broke her arm she was hurried

to a sanitarium about a mile away. Dr. Weeks had been visiting a patient at that institution, and was just departing when the child arrived with her parents. He was asked by the attending physician at the sanitarium to render first aid or emergency treatment. This he agreed to do as an act of humanity. He set and bandaged the arm. His service began and ended with this act. He notified the mother of the danger of swelling and instructed her to notify her own doctor at once. This she did. The doctor, the next day, examined the arm and bandages, but did not disturb or change the same.

All of the medical experts, five in number, in addition to appellant, testified that the treatment was proper. To prove the alleged negligence, plaintiff presented but one medical expert, a Dr. Gardner. He had never attended the child professionally, but had examined her on one occasion some twenty months after the accident. His testimony was based upon hypothetical questions and an examination of the X-rays or radiographs which were taken of the injured arm the morning after the accident. His testimony was to the effect that the flexed position revealed by the radiographs was improper and the bandaging too tight. The testimony of plaintiff's expert does not, in my opinion, establish that the treatment of the fracture did not satisfy the standard of care exercised by the average physician or surgeon of ordinary skill, nor does it show that defendant did not exercise his best judgment in adopting an improved method of treatment, nor does it establish any negligence proximately causing the injury complained of. The fact that this expert might have approved or adopted other methods does not show negligence or want of skill. Appellant was called upon to exercise his best judgment as to the method to be adopted in bandaging the arm so that the broken bones would not become displaced. In my opinion, there is no evidence to show that he did not use ordinary care in his treatment of the child. The most that plaintiff's single expert witness shows is that his judgment differed from that of appellant in the treatment of the fracture, and that he would have pursued a different method. That he might have used a different method is of no consequence. The controlling question is whether the defendant's treatment of the child satisfied the standards of care exercised by the

ordinary surgeon in the community. The testimony, in my opinion, shows without conflict that it did, and, this being so, the case falls within the rule laid down in *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654, and *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683.

It is my opinion that the judgment lacks evidentiary support, and for that reason should be reversed.



7 Cal.App.2d 125

PEOPLE v. EPPERSON.

Cr. 2717.

District Court of Appeal, Second District,
Division 2, California.

May 23, 1935.

1. Infants ⇨20

Defendant who pinched breasts of twelve year old girl held guilty of violating statute making it a felony to commit lewd or lascivious act upon child under age fourteen (Pen. Code, § 288).

2. Rape ⇨52(2)

Verdict of guilty for rape of twelve year old girl held sustained by evidence, where girl gave reasonably clear and probable account of what had taken place, and it appeared that her undergarments were soiled and torn upon return home from ride with defendant, and physician's examination second day after alleged rape revealed hymen was ruptured and that there was small bleeding area to right of hymen.

Appeal from Superior Court, Los Angeles County; Chas. W. Fricke, Judge.

Robert Epperson was convicted of rape and the offense of committing a lewd or lascivious act upon child under age fourteen, and he appeals.

Affirmed.

Sam Schekman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

CRAIL, Justice.

[1, 2] This is an appeal by the defendant after a conviction upon two counts of an information charging the crime of rape alleged to have been committed upon a female under the age of eighteen years and a violation of section 288 of the Penal Code. The sole contention of the defendant is that there was an insufficiency of evidence to sustain the judgment.

Twelve year old Mary Louise Walker lived with her father and mother in Venice, Cal. The defendant lived in a house across the street. On the day alleged in the information, Mary was standing on a street corner in Venice, when the defendant drove up in his automobile. He stopped his car and asked Mary where she was going, and told her that he would take her home. She got in the car; but the defendant, instead of taking her home, drove to some oil fields in the nearby country, saying that he was going to take her for a ride. On the way, he pinched her breasts. This was the act charged as a violation of said section 288. Some place in the oil fields he stopped the car and then told her to get in the back seat, which she did. He also climbed into the back seat. It would serve no useful purpose to relate the details of the rape. After completing the act, the defendant told Mary to get into the front seat and that he would give her some money to buy ice cream, and not to tell her mother what happened.

The mother of the girl testified that when the defendant brought her daughter home that day he blew his horn and said, "Here is your daughter." The girl was nervous and appeared to have been crying. Little Mary told her mother what had happened. The girl's undergarments were soiled and torn. A doctor who made an examination of the girl on the second day thereafter found the hymen ruptured, with a small bleeding area to the right of the hymen.

The defendant contends that the testimony of the prosecutrix is so inherently improbable as to render her evidence of no value. But the testimony of the girl is not improbable; on the contrary, she gave a reasonably clear and probable account of what had taken place.

The defendant's final contention is that there is no justification in the evidence for

a verdict of guilty upon the charge of lewd and lascivious conduct. Under the circumstances already related, no further comment is necessary.

Judgment affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 519

W. I. HOLLINGSWORTH & CO. v. HAAS

et al.

Civ. 10011.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Rehearing Denied May 25, 1935.

1. Brokers ⇨60

Where principals agreed to pay broker, procuring exchange of properties, commission when property received should be resold, exchanged, or transferred, commission to be based on value of exchanged property plus consideration received for equity in property theretofore received, provided that commission agreed to be paid should not exceed \$2,750, resale, exchange, or transfer of property received held condition of broker's right to commission, since proviso clause was not independent agreement to pay minimum commission of \$2,750 in any event.

2. Brokers ⇨60

Where principals agreed to pay broker, procuring exchange of properties, commission when property received should be resold, exchanged, or "transferred," commission to be based on value of their original property, plus consideration received for equity in property received in exchange for original property, provided commission in no event should be less than \$2,750, sale under foreclosure decree of property received in exchange for original property held a "transfer" entitling broker to commission (Civ. Code, § 1039).

[Ed. Note.—For other definitions of "Transfer," see Words & Phrases.]

3. Appeal and error ⇨1010(1)

Trial court's finding, supported by evidence, cannot be disturbed.

4. Contracts ⇨346(10)

Where complaint was based on written agreement and proof showed breach thereof

entitling plaintiff to recover, there was no variance merely because plaintiff's construction of contract was erroneous.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by W. I. Hollingsworth & Company against J. Richard Haas and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for appellants.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Defendants appeal from a judgment for \$2,750 in an action to recover a real estate broker's commission.

Owning certain real estate in the city of Los Angeles, and being desirous of disposing of the same, defendants called upon plaintiff and eventually a three-cornered deal was arranged by the latter whereby defendants received certain realty on Cahuenga boulevard in the city of Los Angeles. Thereafter a mortgage on the Cahuenga property was foreclosed and the property was sold under the foreclosure decree. Included in the exchange agreement signed by defendants was the provision, "I hereby agree to pay my said agent immediately the regular Los Angeles Realty Board commission for his services." Defendants also signed a letter on June 10, 1931, constituting the agreement upon which this action is based, the provisions of which, as essential to a determination of the question before us, are: "In consideration of your services rendered in negotiating an exchange of my property [on] * * * Ninth street for the property [on] * * * Cahuenga Boulevard * * * we agree to pay you upon the resale, exchange or transfer of the property we are acquiring * * * the regular Los Angeles Realty Board commission on the value of [my Ninth street] property based upon the amount represented by the \$60,000 mortgage thereon, plus the consideration which I receive from the equity in the Cahuenga boulevard * * * property.

"Provided, however, that in any event the commission which we hereby agree to

pay * * * shall not be less than \$2750.00."

Appellants contend that no commission whatever was due except upon the resale, exchange, or transfer of the Cahuenga boulevard property, and that the foreclosure and sale of that property under a first mortgage was not a "transfer" within the meaning of that word as used in the agreement.

[1] It will be noted that while the realty board rate of commission is specified in the first paragraph of the agreement, the amount of the commission therein provided for is not fixed, but is to be based upon the sum of \$60,000 plus whatever further sums appellants might receive from the equity in the Cahuenga boulevard property. It is the commission thus calculated which under the terms of this paragraph is to be paid "upon the resale, exchange or transfer" of the property. Respondent's cause of action is based, not upon the first, but upon the second paragraph of the agreement, in which appellants agreed to pay in any event a commission not less than \$2,750. The use of the language "not less than" directly negatives and precludes a construction of this paragraph as a provision for the payment of a commission of \$2,750, whether the property in question be transferred or not, and amounts merely to a proviso that the commission provided for in the first paragraph, when it becomes due, shall be at least \$2,750.

[2] Appellants further contend that no transfer, upon which the commission became due, ever occurred. "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Civ. Code, § 1039. The object and result of a foreclosure and sale of the property thereunder is a transfer "by law" to the purchaser under the decree of the property involved. *Hoppe v. Hoppe*, 104 Cal. 94, 102, 37 P. 894; *Reynolds v. London, etc., Co.*, 128 Cal. 16, 20, 60 P. 467, 79 Am. St. Rep. 17; *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 464, 140 P. 6. Under the agreement, therefore, respondent, upon such transfer, became entitled to its commission.

[3] It is contended, however, that the word "transfer" in this instance does not include the transfer by foreclosure, and that this is shown by the practical con-

struction of the agreement by the acts and declarations of the parties. Even if we concede the admissibility of the oral evidence on this subject, we find merely a conflict of evidence, and there being evidence to support the findings of the trial court, no basis for a reversal upon this point exists.

[4] The complaint having pleaded the agreement for payment of commission of June 10th, that agreement and its breach having been established by the evidence, and the judgment being based upon that agreement, appellants' claim that there was a fatal variance between pleading and proof is not sustained.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 104

FONTAINE v. STORRIE et al.

Civ. 9633.

District Court of Appeal, First District,
Division 1, California.

May 22, 1935.

1. Appeal and error ⇐1010(1)

In action to foreclose lien based upon balance due under subcontract for construction of tunnel, trial court's finding that portion of tunnel constructed was not completed in accordance with terms of subcontract would not be disturbed if there was any substantial evidence to support finding.

2. Appeal and error ⇐1008(1)

In action to foreclose lien based upon balance due under subcontract for construction of tunnel, whether there was substantial performance of subcontract held for trial court.

3. Mechanics' liens ⇐112

Subcontractor held not entitled to foreclose lien based upon balance due under subcontract for construction of tunnel, where evidence showed substantial failure in completion, in that tunnel was off the grade specified from "eight inches to 18 inches too high."

4. Mechanics' liens ⇐290(3)

Subcontractor who was not permitted to foreclose lien based upon balance due under

subcontract for construction of tunnel could not complain of trial court's omission to find lack of substantial performance, where court found all facts relating to performance in detail.

5. Mechanics' liens ⇨112

Subcontractor *held* not entitled to personal judgment or to lien against contractor or its sureties for balance due under subcontract for construction of tunnel, where evidence showed that, after subcontract was surrendered, contractor expended money in excess of demands of subcontractor in completion of tunnel.

6. Mechanics' liens ⇨94

Subcontractor *held* precluded from securing relief under subcontract for construction of tunnel, where subcontract was canceled by subsequent contract.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by W. R. Fontaine against Robert C. Storrie and another, individually and as copartners under the firm name and style of R. C. Storrie & Co., and others. From a judgment, plaintiff appeals.

Affirmed.

Chandler & Quayle, of San Francisco (L. W. Allen, of San Francisco, of counsel), for appellant.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, for respondents Robert C. Storrie and Robert B. Muir, etc.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents Fidelity & Deposit Co. of Maryland, Globe Indemnity Co., Hartford Accident & Indemnity Co., Maryland Casualty Co., and United States Fidelity & Guaranty Co.

TUTTLE, Justice pro tem.

By this action plaintiff, a subcontractor, seeks to foreclose a lien based upon the balance due under his contract. The original contractor and his sureties are joined as defendants. The trial court denied all relief to plaintiff, with the exception that it gave him a personal judgment against the original contractor in the sum of \$3,500. Plaintiff now appeals from the judgment.

In the early part of 1925, Feather River Power Company was the owner of Buck's Creek project in Plumas county. On Oc-

tober 30, 1925, R. C. Storrie & Co., a copartnership composed of Robert B. Muir and Robert C. Storrie, entered into a contract to construct, for the owner a hydroelectric plant for \$7,691,889. This contract, together with a bond executed by defendant surety companies, as required by section 1183 of the Code of Civil Procedure, was duly filed.

On January 22, 1926, Fontaine, appellant herein, and one Dardier, as parties of the second part, entered into a subcontract with Storrie & Co. for the construction of 3,000 feet of a water diversion tunnel connected with the project.

On October 26, 1926, and after this tunnel had been driven some 1,380 feet under said subcontract, the parties to the original subcontract entered into another agreement whereby it was mutually agreed that said contract of January, 1926, between the parties "shall stand cancelled as of the date of this agreement," subject to the condition that Fontaine and Dardier should not, nor should their sureties under their bond "be released from the obligation to pay in full for labor and material furnished for the work done under said agreement up to the date of this cancellation." There were other provisions in this contract which are immaterial here. Prior to the commencement of this action, Dardier assigned to plaintiff all his interest in the lien claim and account, and in any moneys due under the agreement of January 22, 1926.

The contention of plaintiff is succinctly set forth in paragraph X of his complaint. He there alleges that he and his assignor "performed all the conditions of their said subcontract on their part to be performed; that under the terms of said subcontract the said R. C. Storrie and Company became and were indebted to the plaintiff and the plaintiff and the said H. V. Dardier for and on account of the construction of said portion of said tunnel so constructed by them, as aforesaid, in the full sum of \$55,314.89; that the said R. C. Storrie and Company has paid on account of such construction the sum of \$46,285.87, and no more; and that there is still due and unpaid on account of said construction, a balance of \$9,029.02, no part of which has been paid." It also appears that the contract price for driving this tunnel was \$40 per linear foot, and the amount claimed as earned is arrived at by multiplying the total footage of some 1,380 feet by this price per foot.

[1] The first contention of appellant is that there is no evidence to support the finding that the portion of the tunnel constructed was not completed in accordance with the terms of the subcontract. An examination of the record discloses that there is considerable conflict upon this question of fact. If there is any substantial evidence to support this finding, our inquiry can go no further. That such evidence was introduced is beyond dispute, and it is unnecessary to go over the matter in detail. There was evidence that the tunnel was off the grade specified "all the way from 8 inches to 18 inches too high." The lines and grades were given to the subcontractors in accordance with the subcontract. There is evidence that, after plaintiff and his assignor canceled the contract, defendant Storrie & Co. expended some \$11,000 to bring the tunnel to grade and complete the subcontract.

[2-4] To meet this situation, appellant invokes the rule of "substantial performance," and further contends that he is entitled to an express finding to the effect that there was no substantial performance. Like any other question of fact, the one of substantial performance of the terms of a contract is for the trial court. It is true that in the furtherance of justice, and in accordance with section 1187, Code of Civil Procedure, "trivial imperfection" shall not be deemed such a lack of completion as to prevent the filing of liens, and substantial performance is all that is required. The evidence here shows, not merely a trivial imperfection in the performance of plaintiff's contract, but a substantial failure in completion, which would preclude plaintiff from maintaining an action to recover the full amount of the contract. *Bianchi v. Hughes*, 124 Cal. 24, 56 P. 610. As to the omission of the court to find there was no substantial performance, the trial court found, not only that there had been no performance, but it also found all the facts relating to the performance, in detail. Thus the findings show on their face that there was no substantial performance. These contentions, therefore, are without merit.

[5] There is evidence in the record that, after plaintiff surrendered his contract, defendant Storrie & Co. expended some \$11,000 in completing it. This fact was found by the trial court. The amount is far in excess of the demands and claims of plaintiff for the amount due him under the assump-

tion that he had fully performed, and an offset was found to that effect. It follows that there was nothing due plaintiff and his assignor when they ceased work, and they are not entitled to a personal judgment or to a lien, nor are the sureties of the original contractor liable. *Hubbard v. Jurian*, 35 Cal. App. 757, 770, 170 P. 1093.

The trial court allowed plaintiff \$3,500 as being due him under the cancellation contract. This judgment is against Storrie & Co. alone, and has no relation to the original subcontract, according to the findings. The theory upon which the court arrived at this amount is not altogether clear, but, in any event, it has nothing to do with the subcontract upon which this action is based.

[6] Aside from the foregoing, there is an aspect of the case which would seem to absolutely preclude plaintiff from securing relief under his subcontract. This is the simple fact that the subcontract was canceled by the contract of October, 1926. That this contract was executed for this purpose, and that the parties thereby intended to and actually did abrogate the original subcontract, there can be no question. The fact that the trial court did not find expressly that the subcontract was canceled is immaterial, for the court found that this second contract was executed and it is set out in full in the findings. The court then found that the sum of \$3,500 was due plaintiff from defendant Storrie & Co. under the second contract. The conclusions of law are to the effect that plaintiff was entitled to judgment against Storrie & Co. in the sum of \$3,500 and that he was not entitled to recover against the defendants' surety.

The judgment must be upheld, first, upon the ground that there is substantial evidence to support the finding of the trial court that there was nothing due plaintiff under his subcontract, and, second, upon the ground that the second agreement precluded plaintiff from maintaining any action upon the subcontract. There is no contention that the amount awarded plaintiff under the second agreement was less than was due him under that agreement.

Other points urged as grounds for reversal have no substantial merit.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

7 Cal.App.2d 243

SHREVE & CO. v. McGINNIS.

Civ. 9477.

District Court of Appeal, First District,
Division 1, California.

May 29, 1935.

1. Appeal and error ⇨1011(1)

Where evidence is conflicting, District Court of Appeal has no authority to interfere with trial court's judgment.

2. Appeal and error ⇨1071(3)

Where court found buyer liable under contract to purchase jewelry, that finding that buyer read contract before signing it was not supported by evidence held immaterial, since such finding was not necessary to support judgment.

3. Appeal and error ⇨1071(5)

Where buyer signed contract to purchase jewelry thinking that contract set out previous oral agreement between parties, which was allegedly different from contract, finding that buyer was liable under contract would not be disturbed on ground that buyer did not read contract before signing it, where trial court found that contract correctly set out previous oral agreement.

4. Evidence ⇨271(2)

Admitting evidence that seller placed jewelry aside with buyer's name on package held not error, where evidence was admitted for limited purpose of proving allegation in complaint that under terms of contract seller was to hold jewelry in buyer's name for given period.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit by Shreve & Co., against Felix S. McGinnis. From a judgment for plaintiff, defendant appeals.

Affirmed.

C. W. Durbrow and Sullivan, Roche, Johnson & Barry, all of San Francisco, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant from an adverse judgment in a suit against him for the purchase price of two pieces of jewelry. Respondent counted on a written contract in the form of a letter written to appellant setting out the terms of the con-

tract, across the bottom of which appellant had written "O. K." and signed his name. The letter, dated December 28, 1931, read in part: "We herewith acknowledge your purchase of the emerald cut diamond ring and the wide diamond bracelet for the sum of \$18,500.00. We will hold them in our vault in your name with the understanding that they are not to be paid for until you take delivery on June 1st, 1932."

Appellant defended on the ground that the letter was signed by mistake under the belief, induced by the fraudulent representation of respondent's salesman, that the letter correctly expressed an alleged previous oral agreement that respondent would hold the jewelry subject to the right of appellant to buy it on June 1, 1932, at the stipulated price if he then desired to do so.

[1] The trial court found against appellant, and appellant's first contention is that the evidence of respondent's salesman is so inherently improbable and obviously false that as a matter of law appellant was entitled to judgment. Without enlarging upon the evidence, it is sufficient to point to the rule, recognized by appellant, that where the evidence is in a state of conflict this court is lacking in authority to interfere with a judgment entered by the court below. Respondent's salesman testified positively that appellant orally agreed to the purchase and that the letter which appellant afterwards signed embodied the precise terms of this oral agreement. Appellant points to certain facts in evidence which he claims are entirely inconsistent with this testimony. While such facts might create a doubt that the salesman's testimony is true, they did no more than to raise a conflict in the evidence which it was for the trial court to resolve.

[2,3] It was appellant's contention that he signed the contract without reading it. The trial court found against this allegation, and this finding is claimed to be without support in the evidence. No one representing respondent was present when appellant signed the letter, and appellant and two other witnesses testified that he signed it without reading it. The finding is not necessary to support the judgment, and whether the finding is supported by the evidence is therefore immaterial. *Thayer v. Tyler*, 169 Cal. 671, 673, 147 P. 979; *In re McNamee*, 131 Cal. App. 30, 32, 20 P. (2d) 722. This becomes clear if we recall that the court found that the writing as

signed correctly set out the previous oral agreement of the parties. Whether or not he read the letter, appellant knowingly signed it believing it to be a correct memorandum of his agreement, and that is what the trial court found it to be.

[4] Appellant contends further that the court erred in admitting evidence that respondent put the jewelry aside for appellant, wrapped in a duplicate of a sales tag that it had made out in his name on the ground that such evidence was of self-serving acts not binding on appellant.

By the terms of its agreement respondent was to hold the jewelry in its vault in appellant's name. It alleged in paragraph III of its complaint that it had done so, and this was denied in paragraph II of the answer. The court admitted this evidence for the limited purpose of proving this allegation. In this there was no error.

Judgment affirmed.

We concur: TYLER, P. J.; CASH-IN, J.



In re LEAHY'S ESTATE. *
Civ. 9804.

District Court of Appeal, First District,
Division 2, California.
May 15, 1935.

Rehearing Denied June 14, 1935.

Hearing Granted by Supreme Court
July 11, 1935.

1. Appeal and error ⇨934(1)

On appeal from judgment notwithstanding verdict, all evidence, including presumptions and inferences, must be taken most favorably for appellant.

2. Wills ⇨166(8)

Evidence that sister and nephew who stood in confidential relationship to testatrix, who was in hopeless physical and weakened mental condition, actively participated in execution of will which gave to such sister all of residue of estate, and who persistently refused to permit testatrix to see another sister who in previously written will shared equally in residue of estate, held to support inference that undue influence was exercised.

3. Wills ⇨324(3)

Whether will which gave to testatrix' sister all of residue of estate and which was executed while testatrix was in hopeless physical and weakened mental condition was result of undue influence by testatrix' sister and nephew, who stood in confidential relationship to testatrix, and who actively participated in execution of will, held for jury.

4. Judgment ⇨199(3)

New trial ⇨72

Trial judge who believes that evidence preponderates against verdict must grant new trial, but not judgment notwithstanding verdict.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Ella A. Leahy, deceased. Will contest by Anna L. Dixon, opposed by Harry M. Cornyn, as executor, and Mary Cornyn, proponent. From a judgment for the executor and proponent notwithstanding the verdict, the contestant appeals.

Reversed, with directions.

Aaron N. Cohen and C. K. Bonestell, both of San Francisco, for appellant.

Ivan N. Maroevich and John H. Ankele, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal by the contestant of the will of Ella A. Leahy from a judgment notwithstanding the verdict after the court had denied respondents' motion for a directed verdict.

In September, 1930, deceased made a will in which, after making various specific bequests, she divided her property evenly between her two sisters, Mary Cornyn and Anna Dixon. On April 26, 1932, she executed a codicil to this will, changing certain legacies, but leaving the will materially the same. On June 24, 1932, she executed a will whereby \$500 was left to Anna Dixon, the contestant and appellant, and, after a number of small bequests, the remainder was left to Mary Cornyn, the proponent herein. Harry Cornyn, the latter's son, was named executor. These two we refer to herein as respondents, as the other named parties are not actively participating in the contest.

[1] When an appeal is taken from a judgment notwithstanding the verdict, all the

evidence, including the presumptions and inferences, must be taken most favorably for the appellant, because the power of the court to enter such a judgment, like the power to direct a verdict, is the same as the right to grant a nonsuit. In *re Estate of Lances*, 216 Cal. 397, 400, 401, 14 P.(2d) 768. Viewing the evidence in the light of this rule, it appears that for several months before the will was executed the decedent was in a hopeless physical condition; that her mental condition was so weak because of this ailment that she became easily susceptible to a subversion of her will; that the respondents took her under their exclusive control, barring her sister from visiting her; that during this time they obtained from the decedent large sums in cash and deeds to real property, and bills of sale of personal property, without any consideration; that the will attacked was at variance with the decedent's expressed testamentary intentions; that the respondents were active in procuring the execution of the will. It is a matter of significance that the contestant called to see her sister on June 24, 1932, but that the respondents denied her admission. At that time Mary Cornyn told the witness that Ella Leahy was losing her mind. This was the day on which the decedent executed a deed to real property in San Francisco, a bill of sale of certain personal property, an affidavit concerning her title and interest in a large assortment of personal property, and the contested will. During the day an attorney summoned by the respondents was in the house for two hours, the respondents were in and out of the bedroom throughout the day, and a notary was present with the attorney when these documents were executed.

In April, 1932, Ella Leahy was very ill with cancer. There is a conflict in the evidence as to whether or not she was mentally competent to carry on her own affairs from this time up until her death on August 1, 1932. Appellant contends that undue influence was used by Harry Cornyn and his mother in the execution of the last will and also in the drawing of a quitclaim deed to some San Francisco property in which Mary Cornyn was named grantee, and a deed of trust to Harry Cornyn. She also showed that a large number of checks, amounting to \$5,000, were drawn between January and July, 1932, by the deceased in Harry Cornyn's favor. There were also other large amounts made out to Mary Cornyn, and in January, 1932, deceased paid \$3,000

and obtained the assignment to her of a trust deed on Mary Cornyn's home which she later transferred to Harry as trustee for his mother and which was to go to him on his mother's death. On July 11, 1932, at the solicitation of the respondents, she drew a check in favor of Harry Cornyn for \$1,800, but was too feeble to sign it other than by her mark. The fact that the codicil drawn up in April, 1932, two months before the contested will, and while deceased was still in fairly good health, divided the property evenly between the two sisters, is said by the appellant to show that before she came under the domination of respondents the deceased desired to divide her estate equally between her sisters.

[2-4] Appellant admits that there is no direct proof of actual pressure being brought to bear at the very time the will was made, but contends that the existence of confidential relationship plus other circumstances—the activity of respondents in the execution of the will, the variance of the will with the previously written will, the persistent refusal of the respondents to permit appellant to visit her sister during her last illness when respondents kept the deceased under their complete care and control—are sufficient to raise the inference of undue influence.

While none of these circumstances, taken alone, would have raised a presumption of undue influence, all taken together, in view of the weakened physical and mental condition of the decedent, would have supported an inference that undue influence was exercised. In this respect the case is directly in line with *In re Estate of Nelson*, 134 Cal. App. 561, 565, 25 P.(2d) 871; *In re Estate of Graves*, 202 Cal. 258, 262, 259 P. 935; *In re Estate of Yale*, 214 Cal. 115, 122, 4 P.(2d) 153; and similar cases. The question of undue influence thereupon became a question to be determined by the jury (*Id.*), and, if the trial judge believed that the evidence preponderated against the verdict, it was his duty to grant a new trial, but not a judgment notwithstanding the verdict. In *re Estate of Lances*, *supra*, 216 Cal. 397, page 401, 14 P.(2d) 768.

For these reasons the judgment is reversed, with directions to enter judgment in accordance with the verdict.

We concur: STURTEVANT, J.; SPENCE, J.

**FITZPATRICK et al. v. FIDELITY &
CASUALTY CO. OF NEW YORK
et al. ***

Civ. 9425.

District Court of Appeal, First District,
Division 1, California.

May 21, 1935.

Rehearing Granted June 19, 1935.

Opinion Approved and Adopted on Rehearing
Aug. 15, 1935.

Hearing Granted by Supreme Court
Nov. 14, 1935.

1. Master and servant §354

Complaint alleging that agent of compensation insurance carrier acting within scope of his employment, in attempting to replace cast on claimant's injured back, negligently left affected part without support, causing death of compensation claimant, held sufficient to state cause of action for death, as against agent and insurance carrier, but insufficient as against investigator.

2. Pleading §252(2)

Second amended complaint supersedes all previous complaints filed, and its sufficiency must be determined without reference to original complaint.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Agnes Fitzpatrick and another against the Fidelity & Casualty Company of New York and others. From a judgment sustaining demurrers to the second amended complaint, plaintiffs appeal.

Affirmed as to defendant F. Justin McCarthy, Incorporated, and reversed as to defendants Fidelity & Casualty Company and T. J. Nolan.

Vincent W. Hallinan and Emmett R. Burns, both of San Francisco (William F. Herron, of San Francisco, of counsel), for appellants.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents Fidelity & Casualty Co. of New York, F. Justin McCarthy, Inc., and T. J. Nolan.

Bronson, Bronson & Slaven, of San Francisco, for respondent F. Justin McCarthy, Inc.

Hartley F. Peart, of San Francisco, for respondent T. J. Nolan.

PER CURIAM.

This appeal is from a judgment sustaining, without leave to amend, demur-

ers, general and special, to the second amended complaint.

The said complaint alleges that on or about October 9, 1931, the deceased, Henry O. Fitzpatrick, while in the employment of H. Swarz & Co. as a plumber, sustained an injury to his back; that at the time of said injury the said H. Swarz & Co. carried compensation insurance with the defendant the Fidelity & Casualty Company of New York, an insurance company licensed to do business in the state of California; that the injury occurred at Napa, Cal., and that said deceased was treated for said injury by his personal physician, H. V. Baker of Napa, Cal., who applied to his back a cast, immobilizing the affected vertebrae of his spine which had been injured; that the said insurance carrier, upon receiving notice of said injury, insisted that deceased should come to San Francisco to be inspected by its investigators; that deceased protested he was unable to travel such a distance in his condition but that said defendant insisted he come to San Francisco, otherwise no compensation would be paid; that on or about December 6, 1931, said deceased, pursuant to the said compulsion of said defendant, came to San Francisco and was directed by it to go to the office of its investigators, George W. Goodale, Inc., and F. Justin McCarthy, Inc., corporations, which were engaged on behalf of the said defendant to examine, interrogate, and investigate injured men seeking workmen's compensation; that at all times herein mentioned the said corporations and one T. J. Nolan were the agents, servants, and employees of said defendant and acting within the scope and course of their said employment.

The complaint further alleges that at said office, the said corporations and said T. J. Nolan, being in the employment of the said defendant and acting within the scope and course of their employment, demanded of deceased that he submit to the removal of said cast, and when deceased protested against its removal, stating that without it he would suffer great pain, the said T. J. Nolan informed him that unless deceased consented to the removal of said cast no compensation would be paid him; that deceased under said compulsion consented to the removal of the said cast; that deceased was allowed to remain without any cast or support on his back for a long time, but that a few days thereafter the said Nolan visited deceased and applied a cast to his spine, but instead of

applying the cast so as to immobilize the affected vertebræ of the spine he negligently and carelessly applied the cast to a part of the spine which was not affected, and thereby left the affected area without any support, and that solely as a result thereof the said deceased died on December 15, 1931; that the death of said deceased was caused wholly and solely through the negligence, fault, and want of care of defendants and each of them as heretofore alleged.

It is apparent that no cause of action is alleged against F. Justin McCarthy, Inc. Its demurrer was therefore properly sustained, but with reference to the demurrers of the Fidelity & Casualty Company and T. J. Nolan the situation is not so clear.

[1] The amended complaint alleges that at all times therein the said Nolan was the agent, servant, and employee of the Fidelity & Casualty Company, and was acting within the scope of his said employment; that the cast was removed from the back of deceased, by whom is not stated; but that several days thereafter the said Nolan sought to replace the same and that by reason of his negligence and carelessness in placing the said cast upon decedent's back the decedent died. In other words, that the death of deceased was caused by the want of care and by the negligence of said Nolan in placing said cast upon that part of the back which was not affected, and leaving the affected part without any support, the result of which caused the death of said deceased. This complaint also alleges that the said Nolan was then the agent of the Fidelity & Casualty Company and acting within the scope of his employment.

It is sufficient to allege that that which plaintiff claims was done by the defendant was done negligently by him, and that it appears from the allegations of the complaint that the negligence caused or contributed to the death of decedent. *Hughes v. Warman Steel Casting Co.*, 174 Cal. 556, 163 P. 885; *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 P. 954.

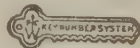
[2] Respondents maintain that certain demurrers and a motion to strike were sustained against the first amended complaint, and that this court should give consideration to those matters. However, these things are not contained in this record on appeal, but are merely set forth in the appendix to respondents' brief. It is elemen-

tary that a second amended complaint supersedes all previous complaints filed (*W. H. Marston Co. v. Kochritz*, 80 Cal. App. 352, 361, 251 P. 959), and its sufficiency must be determined without reference to the original. *Butler v. Wyman*, 128 Cal. App. 736, 18 P.(2d) 354; *Russell v. Ramm*, 200 Cal. 348, 358, 254 P. 532; 21 Cal. Jur. 213. We are of the opinion that the demurrer of F. Justin McCarthy, Inc., was properly sustained, but the demurrers of the Fidelity & Casualty Company and T. J. Nolan were erroneously sustained.

The judgment is affirmed as to F. Justin McCarthy, Inc., and reversed as to the Fidelity & Casualty Company and T. J. Nolan; the said F. Justin McCarthy to recover his costs on this appeal.

On Rehearing.

A rehearing was granted in this case in order that the court might more thoroughly examine and consider the pleadings and proceedings. This having been done, it is the opinion of the court that the decision heretofore rendered should be, and it is hereby, approved and adopted as the decision of this court.



PEOPLE v. BRITTON et al. *

Cr. 2685.

District Court of Appeal, Second District,
Division 2, California.

May 24, 1935.

Hearing Granted by Supreme Court
June 21, 1935.

Criminal law §857(1)

Presence of alternate juror in jury room while jury was deliberating upon verdict held reversible error, notwithstanding instruction that while alternate juror might listen to deliberations, she was not to express any opinion or participate therein.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Floyd C. Britton and others were indicted for an offense, and Linden Parker and Joy Parker were convicted of robbery and kidnaping for the purpose of robbery, and they appeal.

Reversed.

Keith R. Jensen, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

*For subsequent opinion see 52 P.2d 217.

FRICKE, Justice pro tem.

Appellants were found guilty of robbery, and kidnaping for the purpose of robbery. In view of the necessity of reversing the convictions for the cause hereinafter stated, there is no occasion to decide other points involved, as they present no questions of law which are not well settled. Neither does it appear that these questions will necessarily arise upon a retrial of the cause.

Appellants claim reversible error, because when the jury retired to deliberate, the court directed that the alternate juror should retire to the jury room with the jury, and that this was error, even though the court instructed such alternate juror that while she might listen to the deliberations of the jury, she should not express any opinion or participate by word or action in those deliberations.

Subsequent to the appeal herein, this identical question was decided in *People v. Bruneman* (Cal. App.) 40 P.(2d) 891, and we agree with the conclusions therein stated, that the presence of the alternate juror in the jury room while the jury was deliberating upon its verdict was reversible error.

The judgments are reversed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 120

BENNETT v. PAULSON et al.

Civ. 9521.

District Court of Appeal, First District,
Division 2, California.

May 23, 1935.

Rehearing Denied June 22, 1935.

Hearing Denied by Supreme Court
July 22, 1935.

1. Bankruptcy ⚡178(1)

Partner's trustee in bankruptcy held not entitled to set aside bankrupt's transfer of interest in partnership to copartner as fraudulent where liabilities of partnership exceeded its assets at time of transfer (Civ. Code, § 3532).

2. Bankruptcy ⚡209(1)

Where partners agreed to dissolution of partnership and adjusted and terminated their rights as partners, partner's trustee in

bankruptcy, alleging that bankrupt's transfer of his interest in partnership to copartner was fraudulent, held not entitled to accounting to determine whether surplus of partnership assets over liabilities existed until agreement was set aside (Civ. Code, §§ 2424, 2431).

3. Fraudulent conveyances ⚡43(1)

Creditor may not set aside conveyance as fraudulent unless some specific property out of which creditor has right to satisfy his claims is, by fraudulent conveyance, withdrawn beyond his reach (Civ. Code, § 3441).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Suit by Norman H. Bennett against George P. Paulson, alias, and others, wherein Norman H. Bennett, as trustee of the estate of George P. Paulson, bankrupt, was substituted as plaintiff. From a judgment denying plaintiff relief, plaintiff appeals.

Affirmed.

A. Don Duncan and Thos. W. Firby, both of San Francisco, for appellant.

Virgil G. Skinner, of San Francisco, for respondents.

SPENCE, Justice.

This suit to set aside an alleged fraudulent transfer and for other relief was originally brought by Norman H. Bennett, as a judgment creditor of defendant George P. Paulson. Thereafter said defendant was adjudicated a bankrupt, and said Norman H. Bennett was appointed trustee. By order of the trial court, Norman H. Bennett, as trustee of the estate of George P. Paulson, bankrupt, was substituted as party plaintiff herein. The cause was tried by the court sitting without a jury, and resulted in a judgment denying plaintiff any relief. Plaintiff appeals from said judgment.

Defendants George P. Paulson and Peter Boudoures were partners doing business under the firm name of "Maison-Paul Grill." During the pendency of an action in which Norman H. Bennett was plaintiff and said George P. Paulson was defendant, said George P. Paulson recorded notice of his intention to sell all of his interest in and to said partnership to his said partner Peter Boudoures. At the time and place specified in said notice, the partners executed an agreement, whereby the part-

nership was dissolved, and defendant Paulson assigned all of his right, title, and interest in and to said partnership and all of its assets to defendant Boudoures. In consideration of such transfer, defendant Boudoures agreed to assume all of the outstanding partnership obligations and to release defendant Paulson from all claims. After said Norman H. Bennett had obtained judgment against said George P. Paulson individually in the action then pending, and after execution had been returned wholly unsatisfied and resort had been had to supplementary proceedings, said Norman H. Bennett commenced this suit. In the complaint herein, plaintiff alleged that said transfer was made without any consideration and was made with the intent on the part of defendants to hinder, delay, and defraud plaintiff as a judgment creditor of defendant George P. Paulson. Plaintiff prayed that the transfer be set aside as fraudulent, that a receiver be appointed for the purpose of an accounting, and that an order be made charging the interest of defendant George P. Paulson in said partnership with the payment of the judgment in the action above mentioned.

The trial court made full and complete findings and found against plaintiff on many of the material allegations of the complaint. The trial court found, among other things, that the transfer by defendant Paulson to defendant Boudoures of the partnership assets was not made with the intent to hinder, delay, or defraud any creditor of either of them; that said copartnership had not been earning any profits for some time prior to the transfer, and that at the time of said transfer the liabilities of the copartnership exceeded its assets; that said transfer was made in good faith and for a good and valuable consideration; that, by reason of the fact that the assets of said copartnership were insufficient to pay its liabilities, there would have been no assets remaining for the individual use or benefit of either of said partners in the event that the copartnership affairs had been wound up at the time of the transfer.

[1] While appellant claims that the evidence was insufficient to sustain several of the findings made by the trial court, we believe it only necessary to state that a review of the record shows that there was ample evidence to sustain the trial court's

findings to the effect that the liabilities of the copartnership exceeded its assets at the time of said transfer. There being sufficient evidence to sustain the last-mentioned findings, appellant was not entitled to have said transfer set aside. Under somewhat similar circumstances, the court said, in *Gray v. Little*, 97 Cal. App. 442, at page 451, 275 P. 870, 873: "The relief demanded by appellant in this action is the cancellation of the transfer of the partnership property to respondent; that respondent, as the surviving partner, be required to forthwith settle up the partnership business and account to appellant for the interest found to be in favor of said William M. Brown.

"It is apparent from the evidence and the findings of the court that, even if such relief were granted to appellant, it would be a mere idle act, for the reason that the lien which the law gives the respondent, as hereinbefore set forth, would consume the interest of said Brown in the assets of said partnership, and there would be nothing left to turn over to appellant. The law neither does nor requires idle acts. Section 3532, Civ. Code."

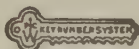
[2] Appellant seems to contend that he was not required to allege or prove that there would be any surplus of assets over liabilities, but was entitled as a matter of right, as the legal representative of the bankrupt, to an accounting to determine whether any such surplus existed. In support of his position, he cites sections 2424 and 2431 of the Civil Code. We find no merit in this contention. Here the partners had not only agreed to a dissolution of the partnership, but had also adjusted and terminated all of their rights as partners by their agreement. Said agreement thereafter governed the rights of the former partners and their legal representatives unless and until said agreement was set aside. This suit was therefore primarily one to set aside said agreement and transfer, and hence appellant's rights were governed by the general rules applicable to suits by creditors for the purpose of setting aside alleged fraudulent transfers.

[3] In 12 California Jurisprudence 976, it is said, "However much a conveyance may be tainted with fraud, no creditor may set it aside, unless some specific property out of which he has a right to satisfy his claims is by the fraudulent conveyance, withdrawn beyond his reach. The intent

to delay or defraud creditors is not enough; there must also be a resulting injury to the creditor, which must be affirmatively shown." See, also, Civ. Code, § 3441. Here appellant failed to allege or prove facts showing that any creditor of said Paulson had been injured by said transfer, and we therefore conclude that the trial court properly denied the relief asked.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



7 Cal.App.2d 190

EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited, OF LONDON, ENGLAND, et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9790.

District Court of Appeal, First District,
Division 1, California.

May 27, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Master and servant ⇨416

Provision of Compensation Act authorizing Industrial Accident Commission to reopen case for good cause is permissive in character and merely authorizes commission to rescind or alter its orders when proper showing is made (St. 1917, p. 850, § 20 (d)).

2. Master and servant ⇨416

Employer and insurer having failed to make timely application for review of award of Industrial Accident Commission, as they should have done if award was entirely without support in evidence, could not complain of refusal of commission to set aside its award on petition to reopen for good cause (St. 1917, p. 850, § 20 (d)).

3. Judgment ⇨547

Prior award of Industrial Accident Commission holding, upon employee's application, that employee's injuries were not compensable held not res judicata as to subsequent application of widow upon employee's death from natural causes for compensation up to time of employee's death, since under statute commission has continuing jurisdiction within time limited to rescind, alter, or amend its decisions or awards (St. 1917, p. 850, § 20 (d)).

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Nellie D. Godwin, opposed by F. Dohrmann, Jr., employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer. To review an award of compensation by the Industrial Accident Commission, employer and insurer bring certiorari.

Award affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

George C. Faulkner, William T. Doyle, and Henry G. Sanford, all of San Francisco, for petitioners.

Everett A. Corten, of San Francisco (A. I. Townsend, of San Francisco, of counsel), for respondents.

TYLER, Presiding Justice.

Certiorari to review an award of the Industrial Accident Commission made in favor of the widow of a deceased employee. The facts are as follows: One Henry T. Godwin was in the employ of F. Dohrmann, Jr., as a chauffeur. On the evening of December 3, 1931, he had taken his employer and a number of guests to the theatre. After the performance he drove them back to his employer's home. He had then finished his work for the day and he proceeded to his own home in a distant part of the city in his own automobile, which he had left at his employer's residence for that purpose. When the employee arrived at his home he stopped his car, got out, and went down to open the garage door. The brakes of the car in some way became released and the car moved down an incline toward the garage, throwing the employee against the door and severely injuring him. He thereafter filed an application for benefits before the Industrial Accident Commission. Hearing was had and a decision was filed holding that the injuries sustained by the applicant arose out of and occurred within the course of his employment. Thereafter, a rehearing was had and the commission then found as a fact that the injuries to the applicant did not arise out of nor occur in the course of his employment, and it was ordered that the applicant take nothing by reason of his claim. Thereafter, Henry T. Godwin died from natural causes wholly apart from and not connected with the injuries he sustained on December 3, 1931, and his widow there-

upon filed an application in her own right for the purpose of determining whether or not she was entitled to disability indemnity up to the date of said employee's death. No claim was made for a death benefit; the employee having died from natural causes not connected with the injury. Hearing was had and in direct opposition to its previous award the commission found that the deceased employee had sustained his injuries in the course of and arising out of his employment, and as a consequence the widow was entitled to an award in the amount of \$491.06. A petition for a rehearing was filed and denied. No application for a writ of review was made, but a petition to reopen the entire case under section 20 (d) of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 850) for good cause was presented before the commission within the prescribed time. This petition was denied, and a rehearing was also denied the same day. This application for certiorari is for the purpose of reviewing the action of the commission in denying the motion to reopen the case.

[1-3] It is petitioners' contention that the injuries the employee suffered did not arise out of or occur within the course of his employment, and the decision of the commission made during the lifetime of the employee that it did not so arise was correct. There would seem to be much force in petitioners' contention. However, no proceedings were instituted for the purpose of seeking a review of the award by the courts; petitioners contenting themselves with an application to reopen the case for good cause under section 20 (d) of the Compensation Act. While the provisions of this section were enacted to enable the commission to reopen and consider an award where the equities of the case demand it, the section is permissive in character and merely authorizes the commission to rescind or alter its orders when a proper showing is made. The commission is therefore necessarily vested with certain discretion and a former award will not be lightly set aside upon the mere filing of a petition to reopen, but a proper showing must be made. *Silva v. Industrial Accident Commission*, 68 Cal. App. 510, 229 P. 870. If the award was entirely without support in the evidence, petitioners should have made timely application for review, but having failed to do so, they cannot now complain of the refusal of the

commission to set aside its award on a petition to reopen made under section 20 (d). *Mantyla v. Industrial Accident Commission*, 130 Cal. App. 139, 19 P.(2d) 799. Petitioners concede the force of this rule, but they claim it is not applicable to the present case for the reason that the commission was destitute of power and without jurisdiction to make any award in favor of the widow of the employee by reason of its former decision that the injury was not compensable. In other words, it is claimed that the prior award is *res adjudicata*. There is no merit in the claim. Under the statute the commission has continuing jurisdiction within the time limited to rescind, alter, or amend its decisions or awards. The doctrine of *res adjudicata* under such circumstances cannot be applied. *Bartlett Hayward Co. v. Industrial Accident Commission*, 203 Cal. 522, 265 P. 195.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



6 Cal.App.2d 735

WILSON v. ATCHISON, T. & S. F. RY. CO.

Civ. 8879.

District Court of Appeal, Second District,
Division 1, California.

May 14, 1935.

Rehearing Denied June 11, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Evidence ☞158(26)

In action against railroad for death of brakeman, refusal to admit testimony of witness as to head brakeman's duty when trains stopped to take water held not error where printed or written rule was best evidence and was readily obtainable.

2. Appeal and error ☞690(3)

In action against railroad for death of brakeman, refusal to admit portion of railroad's rule book would not be considered where it did not appear in record what points relating to plaintiff's case were covered by rules, and rules were not before appellate court.

3. Appeal and error ☞757(3)

In action against railroad for death of brakeman, whether railroad was negligent

would not be considered where portions of record set forth in brief gave no explanation as to how brakeman came to his death, and court could not consider duties of crew of train on which brakeman was employed, or rules relating to such duties.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by H. C. Wilson, as administrator of the estate of Leo C. Wilson, deceased, against the Atchison, Topeka & Santa Fe Railway Company. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

James E. Martin, of Los Angeles, for appellant.

Robert Brennan and Leo E. Sievert, both of Los Angeles, for respondent.

YORK, Justice.

This is an appeal taken from a judgment of nonsuit made at the close of plaintiff's case, in an action brought against defendant corporation for the death of Leo C. Wilson, who was killed when acting as a brakeman for the defendant. The question involved in this appeal is stated by appellant as follows: "The question involved on this appeal is whether or not, under the law and all the evidence offered and introduced in the case, the court erred in granting the defendant's motion for a nonsuit at the close of plaintiff's case." Thereafter, in his brief he sets forth his argument under three points.

[1] "Point 1: That the court erred in refusing to receive in evidence the testimony of the witness Joe Button as to the duty of the head brakeman on freight trains of defendant company when stopping at Pica Station to take water."

We see no error in this ruling by the court, because it clearly appears from the record that what the appellant was attempting to elicit from the witness Button was merely the content of a written or printed rule, as shown by the question asked by the court: "Mr. Button, are those rules in writing, are they written or printed? A. Yes, sir." It appears, therefore, that secondary evidence was attempted to be introduced on the point involved, rather than the best evidence, which was readily obtainable.

[2] Under "point two" appellant objects to the sustaining of the objection of defendant to plaintiff's offer and attempt to introduce into evidence the book of rules of defendant and particularly rules 16 (c) and 84 (a) of said book of rules. While it is possible that the particular rules referred to were applicable to the situation presented to the trial court, since the attorneys representing defendant failed to make any record with reference to what point or points relating to plaintiff's case were covered by these rules, and since the rules are not before the court on this appeal, there is no way by which we may determine that the assumed error of the trial court in rejecting the rules constituted prejudicial error.

[3] "Point three" is apparently the main point relied upon by appellant, since it is the only point mentioned by him in his statement of question involved. It is stated as follows: "Under the law and all the evidence introduced in the case the court erred in granting the defendant's motion for a nonsuit at the close of plaintiff's case."

The grounds upon which defendant's motion was made include the following:

"That plaintiff has failed to prove any negligence on the part of the defendants as alleged in his complaint, proximately causing or contributing to the death of the plaintiff decedent.

"That plaintiff has failed to make any case whatsoever for the jury as to any negligence alleged in the complaint on the part of this defendant."

It is apparent from the portions of the record which are set forth in the brief that the evidence gives no explanation as to how the deceased came to his death. Without being able to consider on this appeal what was contained in the rejected rules or what were the duties of the engineer, the fireman, or other trainmen who made up the crew of the train on which deceased was employed, it is impossible for us to determine whether, under the circumstances shown by the evidence in the record before us, the defendant was guilty of negligence.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

6 Cal.App.2d 669

HOLWICK v. WALKER et al.

Civ. 1703.

District Court of Appeal, Fourth District,
California.

May 9, 1935.

1. Appeal and error ☞989

In determining whether evidence supports finding, appellate court must disregard conflicts in evidence and consider only supporting evidence.

2. Evidence ☞91

Party asserting affirmative of issue has burden of proof.

3. Sales ☞130(3)

Purchaser seeking to rescind sale of fountain lunch business and claiming that sublease from corporation to his vendors conferred no interest because person signing as sublessor had no authority to execute sublease had burden of proof.

4. Corporations ☞409

Corporation's directors may delegate to agent authority to execute leases and subleases.

5. Appeal and error ☞1011(1)

Finding on conflicting evidence cannot be disturbed on appeal if supported by material and competent evidence.

6. Sales ☞123

Purchaser seeking to rescind sale of fountain lunch business could not place vendors in default for nondelivery of awning without demand for possession thereof where purchaser knew before purchasing that awning was in storage.

Appeal from Superior Court, Los Angeles County; Ellis A. Eagan, Judge.

Action by Earl E. Holwick against Henry A. Walker, also known as T. H. Walker, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

James F. McBryde, of Glendale, for appellant.

Lee A. Dayton, of Los Angeles, for respondents.

MARKS, Justice.

Plaintiff brought this action to secure the rescission of the sale to him of a fountain lunch business in the Bear Market in Glendale, Cal., the cancellation of his

promissory note for \$110 given as part of the purchase price, and the recovery of \$990 paid on the purchase price. Judgment went for defendants, and this appeal followed.

While various fraudulent representations are set forth in the complaint, the evidence has limited them to but two which are necessary to be here considered. (1) (a) The validity of a sublease where the lease and sublease contain provisions against subleasing and assignment without the written consent of the lessors and the sublessor, and (b) the validity of a sublease which did not have attached to it the seal or the signature of an officer of the subleasing corporation. (2) The cost of an awning used on the subleased premises.

The premises in question here constituted a stall in what was known as the Bear Market. The building was owned by D. C. and Mary A. Bear. They leased the premises in question to the Dutch Chain Stores, Inc. It in turn subleased to defendants. Both the lease and the sublease contained provisions prohibiting the lessee and the sublessees from assigning or subleasing without the respective written consents of the lessors and the sublessor. The sublease to defendants was dated March 9, 1931, and was signed, "R. L. Anderson, Sublessor." Defendants paid their rent and remained in undisturbed possession of the premises until they delivered possession to plaintiff on June 16, 1932. The possession of plaintiff was not disturbed. He voluntarily abandoned possession on August 13, 1932.

Plaintiff was a realtor and, as such, endeavored without success to sell the fountain lunch business for defendants. In the latter part of May, 1932, he conceived the idea of purchasing the business for himself and negotiations were consummated on June 15, 1932, plaintiff paying defendants \$900 in the form of a check, \$90 in back rent, \$110 in a promissory note, and the assumption of about \$424 unpaid on a lease contract covering fixtures which defendants were purchasing from Western Dairies, Inc. Defendants had paid \$625 advance rent at the time they received their sublease. In the sale, plaintiff received the benefit of this credit. Plaintiff stopped payment on his check on the day it was given. The next morning he had further negotiations with Henry A. Walker and either D. C. Bear or Hayden Bear, his son,

or both, and the \$900 was paid defendants on that day and possession delivered to plaintiff.

Plaintiff alleged in his complaint as one of the grounds for cancellation of the sale "that the defendants, and each of them, as a part of the sale, agreed to assign, transfer and set over the good and valid lease on said premises to the plaintiff herein for the term of three years and three months, at a monthly rental of \$125.00 with a refund of \$37.50; but that no such lease or assignment of lease has been furnished to the plaintiff." This allegation was supported by the testimony of plaintiff.

[1] The trial judge found that the quoted allegation was untrue. In measuring the sufficiency of the evidence to support this finding, we must disregard conflicts in the evidence and devote ourselves to a consideration of the evidence supporting the questioned finding.

Plaintiff had physical possession of the lease and sublease and read at least portions of them. He consulted D. C. Bear, and also Hayden Bear, who was apparently acting as superintendent of the various places of business in the Bear Market, about buying the fountain lunch business from defendants. He was advised by them that he would be a satisfactory subtenant should he purchase the business of defendants. The books of account of the various tenants in the Bear Market were kept in the office of Hayden Bear. The books showing the accounts of defendants were inspected by plaintiff. Plaintiff, in company with Walker, consulted a Mr. Taylor, an executive officer of Western Dairies, Inc., and learned all the details of the business transactions between that corporation and defendants and secured permission to assume and perform defendants' obligations under their contracts with it. Mr. Taylor, in the presence of Walker, advised plaintiff to place his money and note in escrow to be delivered only upon the satisfactory consummation of the entire transaction. Plaintiff refused to act upon this advice. It is evident that he made his own investigation and relied upon his own judgment in making the purchase from defendants.

Plaintiff now claims that the sublease from Dutch Chain Stores, Inc., to defendants gave them no leasehold interest in the property because it was signed by "R. L. Anderson" as sublessor and there is no

showing that Anderson was an officer of the corporation or had authority to bind it by his signature. The only evidence of the authority of Anderson was that he was acting for the corporation in supervising subleases. Further inquiry by defendants as to his actual authority was cut off by the trial judge on objections made by counsel for plaintiff.

[2-4] As a part of this phase of his case, plaintiff is maintaining that Anderson had no authority to execute the sublease. The burden of proof is on the party asserting the affirmative of an issue. We cannot conclude that plaintiff has maintained this burden in the absence of any evidence supporting his contention. The board of directors of a corporation may delegate authority to execute leases and subleases to one of its agents. We cannot assume that such authority was not given Anderson merely for the purpose of reversing the judgment of the trial court.

Furthermore, the insufficiency of the execution of the sublease did not come into the case until August 6, 1932, thirty-two days after the service of what plaintiff maintains was his notice of rescission. This notice said nothing about a defective sublease. On August 6, 1932, counsel for plaintiff had a conference with Hayden Bear. Mr. Bear informed the attorney that he might have difficulty in approving the sublease and its assignment to plaintiff if Anderson's authority was not shown. The attorney then wrote defendants complaining of the manner in which the sublease was executed. Defendants proceeded to have this defect remedied and on August 24, 1932, the board of directors of Dutch Chain Stores, Inc., passed a resolution affirming and ratifying the action of Anderson in signing the sublease.

It is evident from a study of the record that plaintiff knew of the provisions against subleasing and assignment during the early part of his negotiations with defendants. It is also evident that plaintiff relied upon the verbal statements of D. C. and Hayden Bear to him that should he purchase the fountain lunch business he would prove an acceptable tenant to them. It is evident that at the time of his purchase he neither expected nor required defendants to secure a written consent to the sublease or its assignment to him.

[5] The complaint alleges that "defendants falsely and fraudulently represented

to plaintiff * * * that the awning cost \$200.00 whereas it only cost \$125.00. * * " The trial court found that this allegation was untrue. The evidence on the question is conflicting and there is material and competent evidence in the record supporting the finding. It therefore cannot be disturbed here.

[6] Plaintiff now urges that the awning was never delivered to him. The evidence is clear that this awning was not used during the spring and summer months. It was regularly stored about the 1st of May and was not used again until late fall or early winter. Defendants paid the storage bill and plaintiff knew it was in storage. He made no effort to get it nor did he request its possession from defendants. Even though we assume that the question of nondelivery of the awning can be considered under the pleadings, plaintiff cannot place defendants in default for its nondelivery without a demand for its possession when he knew it was absent from the place of business he was purchasing prior to the time he made the purchase.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



7 Cal.App.2d 91

**ROSSI v. SUPERIOR COURT, IN AND FOR
SAN JOAQUIN COUNTY.***

Civ. 5405.

District Court of Appeal, Third District,
California.

May 21, 1935.

As Modified on Denial of Rehearing
June 14, 1935.

Hearing Denied by Supreme Court
July 17, 1935.

1 Justices of the peace ⇨ 166(2)

Superior court held without jurisdiction to try cause on appeal from justice's court where more than one year elapsed since appeal was perfected, in absence of stipulation extending time of trial (Code Civ. Proc. § 981a).

2. Justices of the peace ⇨ 166(2)

Superior court could not try cause on appeal from justice's court after one year from time when appeal was perfected because of stipulation extending time for settling proposed statement of case, which contained no stipulation extending time for trial (Code Civ. Proc. §§ 975, 981a).

Petition by E. J. Rossi for a writ of mandamus to compel the Superior Court, in and for the County of San Joaquin, to dismiss an appeal from the justice's court for failure to prosecute the appeal with due diligence.

Peremptory writ of mandamus issued.

Nutter & Rutherford, D. R. Jacobs and Stephen Dietrich, all of Stockton, for petitioner.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the superior court of San Joaquin county to dismiss an appeal from the justice's court of Stockton township, under the provisions of section 981a of the Code of Civil Procedure, for failure to prosecute the appeal with due diligence.

In a suit for damages, the justice's court of Stockton township rendered judgment in favor of this petitioner for the sum of \$791.50, on November 30, 1932. On motion for new trial, the judgment was modified, and the motion was denied as to the damages awarded in the sum of \$350, on January 28, 1933. Notice of appeal from that judgment was served and filed with the justice's court on February 9, 1933. The fees of the justice of the peace were fully paid. An undertaking on appeal was served and filed on the last-mentioned date in conformity with the provisions of section 978 of the Code of Civil Procedure. All pleadings and proceedings were transmitted and filed with the clerk of the superior court of San Joaquin county, March 18, 1933. July 13, 1934, a stipulation of counsel was filed authorizing the return of the record to the justice's court for

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 46 P.(2d) 1019.

the purpose of permitting the justice of the peace to add to the record on appeal certain entries contained in his docket. This stipulation specifically provides that it shall not affect the plaintiff's right to a dismissal of the appeal for want of prosecution. March 18, 1935, the cause was set for trial by the superior court, over the protest of the plaintiff. April 8, 1935, the plaintiff moved the superior court to dismiss the appeal under the provisions of section 981a of the Code of Civil Procedure, for lack of prosecution, which was denied.

[1] The superior court is without jurisdiction to try this cause on appeal from the justice's court for the reason that more than one year has elapsed since the appeal was perfected. Section 981a of the Code of Civil Procedure is mandatory in that regard when no stipulation extending the time of trial has been filed by the parties to the action. *Vecki v. Superior Court of the City and County of San Francisco*, 79 Cal. App. 370, 249 P. 547. No such stipulation was filed in the present case. The fact that the records were returned to the justice's court by stipulation after the appeal had been taken, for certain additions thereto from the docket, does not serve to extend the time within which the case must be tried by the superior court, nor does that procedure modify the mandatory provisions of the statute above referred to.

[2] The mandatory provisions of the statute requiring the cause to be tried by the superior court within one year of the time of the appeal is not affected by the stipulation of counsel which was filed in the case extending the time allowed by section 975 of the Code of Civil Procedure to March 1, 1933, for settling a proposed statement of the case. This document contains no stipulation extending the time for the trial of the case.

For the reason that the superior court of San Joaquin county is without jurisdiction to try the cause, it is ordered that a peremptory writ of mandamus issue directing that court to dismiss the action.

I concur: PULLEN, P. J.

ROSSI v. SUPERIOR COURT, IN AND FOR
SAN JOAQUIN COUNTY.

Civ. 5410.

District Court of Appeal, Third District,
California.

May 21, 1935.

Prohibition $\Rightarrow$ 3(1)

Petition for writ of prohibition to restrain superior court from proceeding to try a case on appeal from justice's court on ground that more than one year had elapsed since appeal was perfected was dismissed, where peremptory writ of mandamus instructing superior court to dismiss action for same reason had been issued, since mandamus was proper remedy to enforce provisions of statute requiring appeal to be taken within one year (Code Civ. Proc. § 981a).

Petition by E. J. Rossi against the Superior Court, in and for the County of San Joaquin, for a writ of prohibition to restrain respondent from proceeding to try a case on appeal from the justice's court.

Petition dismissed.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for petitioner.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of prohibition to restrain the superior court of San Joaquin county from proceeding to try a case on appeal from the justice's court of Stockton township, on the ground that the superior court is without jurisdiction to do so, for the reason that more than one year has elapsed since the appeal was perfected, and that no stipulation extending the time of trial was filed therein.

This proceeding involves the same appeal in which this court has this day filed its opinion (45 P.(2d) 376) directing the issuing of a peremptory writ of mandamus instructing the superior court of San Joaquin county to dismiss the action for the reason that it is without jurisdiction to try the cause as provided by section 981a of the Code of Civil Procedure. Mandamus

is a proper remedy to enforce the provisions of this statute, and this petition for a writ of prohibition is therefore *functus officio*.

The petition for a writ of prohibition is dismissed.

I concur: PULLEN, P. J.



6 Cal.App.2d 749

PEOPLE v. BIRDSSELL

Cr. 1412.

District Court of Appeal, Third District,
California.

May 14, 1935.

1. Indictment and Information ☞114

Information which charged defendant with having suffered prior convictions *held* sufficient, notwithstanding failure to allege that defendant had served term in any state or federal prison under prior convictions, where defendant admitted serving separate term in a state's prison under each prior conviction (Pen. Code, § 644).

2. Criminal law ☞1202(1)

Finding that defendant who suffered prior convictions for three forgeries, one of which was committed July 23, 1931, and one of which was committed September 17, 1931, was habitual criminal, *held* proper, notwithstanding that forgery did not become ingredient of statute relating to habitual criminals until August 19, 1931, where statute in force July 23, 1931, provided that one who had suffered three prior convictions of "any" felony was habitual criminal (Pen. Code, § 644).

3. Criminal law ☞995(6), 1177

That judgment provided that sentence on each count should run consecutively and concurrently, whereas commitment provided that sentence on each count should run consecutively and not concurrently, *held* not to render judgment incapable of enforcement,

since error in judgment was clerical error and could be corrected, and in any event rights of defendant were not materially affected, inasmuch as he had been sentenced to imprisonment for life as an habitual criminal without right of parole (Pen. Code, § 644).

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Raymond E. Birdsell entered a plea of guilty to making and passing two fictitious checks and admitted prior convictions of forgery, and he appeals from order sentencing him to imprisonment for life as an habitual criminal without right of parole.

Order affirmed.

Raymond E. Birdsell, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged in counts 1 and 2 with making and passing two fictitious checks. In counts 3, 4, and 5 he was charged with having suffered prior convictions of forgery. Upon arraignment appellant entered a plea of guilty to counts 1 and 2 and admitted having suffered the three prior convictions of forgery as charged in counts 3, 4, and 5.

[1] The information failed to allege that appellant had served a term in any state or federal prison for the crime set out in each of counts 3, 4, and 5, an essential element in the definition of an habitual criminal, but upon arraignment for judgment appellant admitted in open court that he had actually served a separate term in a state's prison upon each of said separate felonies charged in the three counts. This was sufficient. In *re Boatwright*, 216 Cal. 677, 15 P.(2d) 755; *People v. Harvey*, 137 Cal. App. 22, 29 P.(2d) 787.

[2] Appellant also urges he was illegally adjudged an habitual criminal because the offense set out in count 1 of the complaint was committed July 23, 1931, and as pointed out in the case of *People v. D'A Filippo*, 220 Cal. 620, 32 P.(2d) 962, forgery did not become an ingredient of the provisions relating to habitual criminals until August 19, 1931 (section 644 of the Penal Code, St. 1931, p. 1052), and there-

fore a conviction for forgery prior to August 19, 1931, would not have supported a finding the accused was an habitual criminal under that statute. However, in July, 1931, and at the time the crime charged in count 1 of the information was committed, section 644 of the Penal Code read: " * * * Every person convicted in this state of any felony who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole * * *."

As to count 2 of the complaint the cause there set out was committed September 17, 1931, and is affected by the provisions of section 644 of the Penal Code as amended. Under either count therefore, and whether before the amendment or subsequent thereto appellant was legally held to be an habitual criminal.

[3] Appellant also urges that the judgment as pronounced is too vague and uncertain to be capable of enforcement. That part of the judgment complained of reads: "It is therefore Ordered, Adjudged and Decreed, that the said Raymond E. Birdsell be punished by imprisonment in the state prison of the state of California at Folsom for life, not subject to parole being a habitual criminal, as provided in section 644 of the Penal Code of the State of California, term of sentence on each count to run consecutively and concurrently." The commitment reads: " * * * The term of sentence on each count to run consecutively and not concurrently." It is very obvious that the error in the judgment was a clerical error, and as such can be readily corrected. Were the matter called to the attention of the trial court we see no reason why the record could not be amended to speak the truth and conform to the order of the court as made. However, the correction would not materially affect the rights of appellant as he stands sentenced to imprisonment for life without right of parole, and whether the true judgments in counts 1 and 2 run consecutively or concurrently, cannot be considered material under the circumstances.

The Attorney General has moved to dismiss the appeal on the ground that the same was improperly taken, and while the point may be correct we have nevertheless exam-

ined the record and considered the appeal as it was presented on its merits.

Finding no error, the order is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



7 Cal.App.2d 124

In re FLAMMER'S ESTATE.

HUGHES v. FLAMMER.

Civ. 9957.

District Court of Appeal, Second District,
Division 1, California.

May 23, 1935.

Husband and wife ☞264

Findings to effect that all property of decedent was community property so as to entitle widow thereto as against decedent's sister, who claimed that part thereof was separate property of decedent, *held* to support judgment distributing whole estate to widow.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the estate of Paul Flammer, deceased. From a judgment distributing the entire estate to Mae E. Flammer, widow, Annie Hughes, objector, appeals.

Affirmed.

Frank G. Howe, Ira C. Doane, and Frank L. Stearns, all of Los Angeles, for appellant.

Leonard Comegys, C. O. Bacon, and James Hosick, all of Los Angeles, for respondent.

YORK, Justice.

This action arose from a petition of Annie Hughes for partial distribution of property of the estate of Paul Flammer, her brother, as the separate property of deceased, to be divided in equal shares to herself and Mae E. Flammer, his widow, and

the petition of the widow praying that all the property of deceased be decreed to be community property of deceased and herself, and that it be distributed solely to her. The facts alleged in both petitions as to how the various properties were acquired were denied in answers filed by the respective parties.

Respondent moved for judgment of nonsuit, which was denied, and upon conclusion of the hearing the court found that all the property of deceased was community property of respondent and deceased, and judgment was entered distributing the whole of said estate to respondent as widow of decedent. This appeal is prosecuted by the sister of decedent from said judgment.

The findings of the trial court are very complete and were found on evidence introduced, although it is true that there was a substantial conflict in the evidence on all controverted matters. We have been forced to examine the evidence set out in the transcript by reason of the failure of appellant to quote therefrom in her opening brief. The findings were sufficient to support the judgment and the decree ordering distribution made and entered.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



7 Cal.App.2d 7

PEOPLE v. WATROUS.
Cr. 1416.

District Court of Appeal, Third District,
California.

May 15, 1935.

1. Witnesses ⇨40(1)

Extreme youth is not per se sufficient to exclude a witness from stand, test being not one of age but of understanding and capability of receiving just impressions of facts in issue and ability of relating those facts truly, and there must be some understanding before oath is administered of nature and obligation thereof (Code Civ. Proc. § 1880, subd. 2).

2. Witnesses ⇨77, 79(2)

Youthful witness' capability of receiving just impressions of facts in issue and ability

of relating those facts truly is for determination by trial judge, but examination of witness on voir dire should be sufficiently broad and searching to establish those requisites (Code Civ. Proc. § 1880, subd. 2).

3. Witnesses ⇨79(4)

Entire record made by witness under ten years of age may be examined to determine whether he is competent to testify (Code Civ. Proc. § 1880, subd. 2).

4. Witnesses ⇨79(2)

In prosecution for committing lewd acts upon two four year old girls, refusal to admit proceedings had upon preliminary examination, and of inquisition of grand jury, held error, where proceedings disclosed that children did not comprehend nature of proceedings and did not indicate sufficient understanding to narrate circumstances surrounding alleged offense, and that testimony taken before grand jury was result of leading and suggestive questions, while testimony at trial was direct and connected, indicating at least some preparation, and language and expressions used by each of children was almost identical as that employed by other (Code Civ. Proc. § 1880, subd. 2; Pen. Code, § 288).

5. Criminal law ⇨698(2)

In prosecution for committing lewd acts upon small children, court should of its own motion have confined testimony along strictly legal lines (Pen. Code, § 288).

6. Criminal law ⇨419, 420(1)

Infants ⇨20

In prosecution for committing lewd acts upon small children, fact of complaint by child is admissible, but narration of details thereof is "hearsay" and therefore incompetent (Pen. Code, § 288).

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

7. Infants ⇨20

In prosecution for committing lewd acts upon two four year old girls, testimony of girls' grandmother as to details of alleged acts as narrated to grandmother by girls should have been excluded, notwithstanding objection to testimony was informally interposed (Pen. Code, § 288).

8. Infants ⇨20

In prosecution for committing lewd acts upon two four year old girls in the afternoon, complaint made to girls' grandmother following morning held not too remote so as to make testimony thereof inadmissible, notwithstanding complaint was not made to girls' mother with whom girls spent time from 4 o'clock in afternoon of day offense was charged to have occurred until 7 o'clock

following morning, when they were taken to home of grandmother (Pen. Code, § 288).

Appeal from Superior Court, Stanislaus County; L. J. Maddox, Judge.

Herbert Malchholm Watrous was convicted of violating provisions of Penal Code, § 288, and he appeals.

Reversed.

H. E. Paul and C. M. Hanson, both of Modesto, and Charles O. Busick, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was indicted for the offense denounced by section 288 of the Penal Code, and after a trial by the court, sitting without a jury, was found guilty and sentenced accordingly. This appeal is from that judgment, and the order denying a new trial.

There is no necessity to state in detail the character of the acts charged, since it is the contention of appellant that at least as far as he is concerned the acts never occurred.

The indictment is in two counts. One count charges certain acts committed against a little girl four years of age, and the second count refers to similar acts affecting the twin sister of the child referred to in count 1.

The matter was brought to the attention of the officers by the maternal grandmother with whom the little girls stayed during the day while their parents were employed. A complaint was issued and a preliminary examination attempted, but it being apparent to the district attorney and the committing magistrate, after a considerable examination of each of the proffered witnesses, that the little girls did not have the ability to receive just impressions nor to relate them truly, they were held incompetent and the proceedings dismissed. Some two months later the matter was taken before the grand jury and an indictment returned, and after trial thereon conviction obtained.

At the trial of the case held approximately five months after the commission of the alleged offense, the two little girls were sworn and testified over the objection of appellant. This raises the first point relied upon by appellant for reversal. It is also claimed the refusal of the trial court to admit the record of the proceedings at the

preliminary hearing and before the grand jury, as bearing upon the competency of the witnesses to testify, constituted error.

At the trial, counsel for appellant attempted to challenge the capacity of the children as competent witnesses. Several questions were asked to test their recollection of past events. Objections were made thereto, but apparently the answers were permitted although the trial judge said he considered the questions out of order at that stage of the examination and suggested the proper time would be to establish the fact of lack of memory on cross-examination, stating the capability of the witnesses was a matter entirely for the court. Finally counsel for appellant said: "Now we would like to include in the consideration of the competency of the witness the fact on previous occasions the witness was unable to testify to the particular facts which are to be brought out here, which would necessarily show that there is no present independent recollection of those facts." To this the prosecution objected, and after some further discussion between the court and opposing counsel the district attorney said: "We will stipulate * * * that the preliminary transcript of the preliminary examination * * * together with the transcript of the testimony taken before the county grand jury * * * of the little witness * * * may be admitted in evidence and considered as read." Mr. Paul: "Purely as determinative of the competency. * * *" The Court: "I will admit it for the purpose of determining the qualification of the witness, both of them." District Attorney: "* * * We refuse to stipulate to the introduction of those two documents merely for the purpose of determining whether or not the witness is qualified. I want the record clear on that. I do not want any such stipulation as that." The Court: "Then I will sustain the objection then." And the court thereupon refused to admit the proceedings at the preliminary examination and the inquisition before the grand jury, and directed the witness to be sworn and testify.

[1,2] Extreme youth is not per se sufficient to exclude a witness from the stand. The test is not one of age but of understanding and the capability of receiving just impressions of the facts in issue and the ability of relating those facts truly. As a necessary inference also from the mandatory statutory requirement that a witness be sworn before testifying there must be some

understanding, before the oath is administered, of the nature and obligation thereof. The possession of these requisites is a matter for determination very largely by the trial judge but the examination of the witness on voir dire should be sufficiently broad and searching to establish these requisites.

As pointed out by Mr. Justice Works in *People v. Delaney*, 52 Cal. App. 765, 199 P. 896, 901, under the terms of subdivision 2 of section 1880 of the Code of Civil Procedure "there are two separate tests for a determination of the question whether children under 10 years of age may be witnesses. They cannot testify if it appears, first, that they are incapable of receiving just impressions of the facts respecting which they are examined; second, that they are incapable of relating those facts truly." While, as the learned justice points out, the tests of these two requirements must be satisfied through the same medium, that is, through the narrative ability of the child, nevertheless they relate to different periods of time. "The just impressions" have reference to the date of the occurrences which are under inquiry, whereas the capacity for "relating truly" is determined as to the date upon which the child is offered as a witness, "therefore, if a given child shall have made narration of the facts of an occurrence at a time less remote from the time of their happening than is the date of the trial, that narration would be expected better to indicate whether he had received a just impression of the occurrences than would his narration, or his examination on his voir dire, at the trial. On the other hand, his examination at the trial would furnish the guide for determination of the ability truly to narrate, provided that a comparison of that examination with the earlier narration would furnish a proper aid to the ascertainment of that test. * * * Such a comparison is to be made by the court, for the purpose of determining whether the child is competent to be a witness, thus presenting a very different question from the one requiring the jury to determine, by comparison, whether statements made in an earlier narration are so variant from his testimony, after he has become a witness, as to make that testimony unworthy of credence."

[3, 4] The case of *People v. Walker*, 112 Cal. App. 146, 296 P. 692, is to the same effect that the entire record made by a wit-

ness under ten years of age may be examined to determine whether he is competent to testify. We will not extend this opinion by quotations from the record of the youthful witnesses made at the preliminary but it was very obvious that they did not comprehend the nature of the proceedings nor did they indicate sufficient understanding to narrate the circumstances surrounding the alleged offense. The testimony taken before the grand jury was the result of leading and suggestive questions and only then was it possible to bring out a narration of what was alleged to have occurred. On the other hand their testimony at the trial was quite direct and connected, indicating at least some preparation, and the language and expressions used by each of the children was almost identical as that employed by the other. It seems improbable that in five or six months such mental powers would have developed as would permit them to qualify so readily without the aid of outside suggestion. It was error therefore to refuse to admit the proceedings had upon the preliminary examination and of the inquisition of the grand jury into the charges here under consideration.

[5] Another error appearing in the record was permitting the grandmother to testify as to what was told her by the little girls. It is true no definite or clear-cut objection was made to the introduction of this testimony but we believe sufficient was said to notify the court and prosecuting attorney of the attitude of appellant, and in view of the gravity of the charge, the character of the testimony presented, and the tender age of the children offered as witnesses, the court should of its own motion have confined the testimony along strictly legal lines. As the court, speaking through Mr. Justice Van Fleet, said in *People v. Baldwin*, 117 Cal. 244, 49 P. 186, 187: "In this class of prosecutions, the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right in an endeavor to maintain his innocence."

The grandmother, when called as a witness, stated that one of the little girls started to tell her something immediately upon arriving at her house the morning fol-

lowing the alleged occurrences involving appellant. The question was asked, "What did Barbara say?" to which counsel for appellant said " * * * We will ask that the answer to the question be limited to the fact of complaint without any details as to persons involved." The Court: "Yes." Mr. Fowler: " * * * The authorities, I understand, will allow the fact that a complaint has been made to be put in evidence. Now, of course, to be thoroughly frank with the court and profess a little ignorance to ask this witness if a child made a complaint is calling for a conclusion, obviously, because it should be for the court to determine whether or not the complaint was made." The Court: "All he objects to her is naming the party. He don't object to her naming the incidents." Mr. Paul: "As I understood, what I was trying to make clear, we would be quite willing to admit evidence that complaint was made and sufficient statements so you could tell what sort of a complaint it was without going into all of the details and getting in the hearsay, but omitting the name of the party. They may give the time and place, that sort of thing, without going into all the details." Mr. Paul: "Well, if the court please, we do not wish to be unduly contentious about this matter, I believe the fact of complaint is admitted purely as *res gestæ*. That is the question here, it is rather remote, as far as that goes. We are perfectly willing to concede that the witness may testify that complaint was made, subject, of course, to having explanation of the remoteness later included, which I imagine it would be. It seems to me that in accordance with the rulings in the cases that the fact of complaint should be elaborated only so far as to make it clear that the little girls were not complaining, for instance, that they had been run down by an automobile, something like that, it is reasonable to show that much. In other words to show what the nature the offense was, not to go into all the details." The Court: "To go into the character of the offense but not name the parties." Mr. Paul: "Not all the little details." The Court: "It is not necessary to go into all the details, but what pertains to the particular things that were done."

Thereupon the witness was permitted to tell in detail all that was told her by the two children, in its fullest detail. At the conclusion of the testimony counsel for appellant moved that the answers of the witness be

stricken. This objection was opposed by the district attorney and the court refused to strike it out because as it stated, "there was no objection." "Objection was, however, sustained as to any further examination of the witness along similar lines."

[6] The rule is, very clear that the fact of complaint is admissible but the narration of details thereof is hearsay and therefore incompetent. *People v. Wilmot*, 139 Cal. 103, 72 P. 838; *People v. Lambert*, 120 Cal. 170, 171, 52 P. 307; *People v. Mayes*, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126.

As said in *Greenleaf on Evidence*, vol. 3, par. 213: "The true rule is to admit evidence of the fact of complaint in all cases, and in no case to admit anything more. The evidence when restricted to this extent is not hearsay but in the strictest sense original evidence. When, however, these limits are exceeded it becomes hearsay in a very objectionable form."

[7] We believe, therefore, that in spite of the somewhat informal objections interposed to the testimony of the grandmother it was sufficient to protect the interests of appellant and the court should have excluded her testimony or granted the motion to strike out at the conclusion thereof.

When it is recalled that the only evidence tending to connect the defendant with the crime—which he at all times denied—was the testimony of the two four year old children and the testimony of the grandmother, who could only testify as to what she was told, it is obvious that the capacity of the children as witnesses is vital. While in particular cases a strict adherence to the rules of evidence may appear to defeat the ends of justice, long experience has taught the danger of relaxing their force.

[8] Objection was also made that the complaint by the children was too remote. With this we do not agree. The alleged offense occurred during the afternoon and complaint was made to the grandmother the following morning. It is true no complaint was made to the mother with whom the little girls spent the time from 4 o'clock in the afternoon of the day the offense is charged to have occurred until 7 o'clock the following morning, when they were taken to the home of the grandmother. It cannot be said, however, as a matter of law, that because complaint was not made to the mother but was made the following morning to the grandmother, it was remote.

For the reasons given we believe that the defendant failed to receive the protection of the law to which he was entitled, and for that reason the judgment and order must be reversed. It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



7 Cal.App.2d 96

PEOPLE v. MOON.

Cr. 310.

District Court of Appeal, Fourth District,
California.

May 21, 1935.

Rehearing Denied May 28, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Criminal law ⚡202(2)

Dismissal of count charging defendant with robbery *held* not to prevent conviction on another count charging defendant with grand theft (Pen. Code, § 954; Const. art. 6, § 4½).

2. Criminal law ⚡338(1)

Refusal to permit complaining witness in grand theft prosecution to state whether he had desired to drop case because he did not believe defendant had taken his pocketbook *held* not error, since witness' state of mind was not in issue.

3. Larceny ⚡62(1)

Testimony of complaining witness that defendant was standing to left and close to witness when witness felt some one taking pocketbook from his pocket, and that defendant was only one in room close enough to have reached pocket, *held* to sustain conviction for grand theft as against objection that defendant did not have opportunity to take pocketbook from witness' pocket.

4. Larceny ⚡79

Failure to instruct in grand theft prosecution that petit theft was included in grand theft and that jury could find defendant guilty of lesser crime was not error where money was taken from person of complaining witness, and there was no evidence upon which jury could have found defendant guilty of petit theft (Pen. Code, § 487).

5. Criminal law ⚡795(2)

Instruction relating to lesser degree of crime need not be given where there is no

evidence upon which jury can find defendant guilty of crime of lesser degree.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Cecil Moon was convicted of grand theft, and he appeals.

Affirmed.

Arthur E. Koepsel, of Balboa, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was accused of the crime of robbery in one count of an information and of the crime of grand theft in a second count. He was tried with a jury, and at the close of the evidence for the prosecution the count charging robbery was dismissed on motion of the district attorney. The defendant then moved to dismiss the second count, and also for an instructed verdict as to that count, on the ground that the grand theft charge was included in the robbery charge, that the defendant had been once in jeopardy, and that a dismissal of the first count automatically dismissed the second. This motion was denied, the defendant was convicted on the second count, and this appeal followed.

It appears from the evidence that the complaining witness, Claude Chilcoat, first met the appellant at a poolroom in Santa Ana on January 21, 1935. They had a number of drinks of liquor together, at the expense of Chilcoat, after which the appellant asked Chilcoat to take him home. After going to a house, where they met three other men, the appellant and Chilcoat went out and bought some wine. Chilcoat paid for the wine and placed his pocketbook, containing a \$10 bill and four \$1 bills, in his rear left pocket with a can of tobacco. Then they returned to the house where the other men were, and a little later Chilcoat felt somebody take something from his pocket and immediately discovered that his pocketbook and tobacco were gone. After a short conversation he searched the appellant but did not find the pocketbook. As Chilcoat was leaving, one of the men handed him his tobacco can, which he picked up from a table. Before the appellant was searched, one of the other men left the house. Shortly thereafter

he was seen putting some bills in his pocket and covering something with loose dirt. A little later the witness who observed this returned and found Chilcoat's pocketbook buried there. This was preserved and produced at the trial. After Chilcoat left, the other men went to a liquor store and made a purchase, paying for the same with a \$10 bill, although the man who paid for it admitted that he had only \$1.40 on that day. Another witness testified that later that evening he went to the house where these men were, and that one of the men who was present when the money was taken told him that the appellant had taken the money. Although this statement was made in the appellant's presence, he made no reply.

[1] The main ground urged for reversal is that the dismissal of the first count of the information constituted a "former acquittal," and that as the appellant had been once in jeopardy, he could not be convicted on the second count. The crime of robbery contains an element which is not present in the crime of grand theft, and this contention is without merit. The information complied with section 954 of the Penal Code, and under the provision of that section, even an acquittal on one count is not to be deemed an acquittal on the other. In *People v. Ranney*, 123 Cal. App. 403, 11 P.(2d) 405, 406, the court said: "The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of 'two or more different offenses of the same class of crimes or offenses, under separate counts.' That section, as amended in 1927, then provides that, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein."

And in *People v. Day*, 199 Cal. 78, 248 P. 250, 252, in speaking of this section of the Penal Code, the court said: "To hold

that, when two alternative counts are presented to the jury, an acquittal of a higher offense stated in one count necessarily involves an acquittal of the lesser offense included therein, and is a bar to the conviction of the higher offense set out in the alternative count, would practically nullify the beneficial object of the amendment. The true test as previously indicated is the presence of a fact necessary in one offense and absent in another."

It was the purpose of the amendments to this section of the Code and of section 4½ of article 6 of the Constitution to do away with such technicalities as this and to eliminate them as grounds for a reversal.

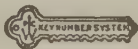
[2] It is next urged that the court erred in sustaining an objection to a question asked of the complaining witness as to whether he had not desired to drop the case because he did not believe the appellant had taken his pocketbook. The state of mind of the complaining witness was not in issue, and what he believed was not evidence of any fact.

[3] It is argued that the verdict is contrary to law and to the evidence, in that it rests entirely upon the uncorroborated testimony of an accomplice, and that it does not appear that the appellant had an opportunity to take the pocketbook from the pocket of the complaining witness. In the latter respect, it is claimed that this case is on all fours with the case of *People v. Silva*, 48 Cal. App. 728, 192 P. 330. In that case the court held that there was no evidence to show that the defendant was near enough to the complaining witness to have abstracted his purse from his pocket, or that he knew the defendant had the money on his person. In the case now before us, there is ample evidence that the appellant was standing to the left and close to the complaining witness at the time the latter felt some one taking the pocketbook from his pocket. The appellant had seen the complaining witness make a number of purchases and knew he had the money, and the complaining witness testified that at the time his pocketbook was taken the appellant was standing close to him on his left side, and that he was the only one in the room who was close enough to have reached his pocket. If the witness to whom the appellant refers as an accomplice was in fact such, his testimony was sufficiently corroborated by other evidence.

[4, 5] It is finally urged that the court, on its own motion, should have instructed the jury that petit theft is included in grand theft, and that they might find the appellant guilty of the lesser degree of the crime. The money here in question was taken from the person of the complaining witness (section 487, Penal Code), and there is no evidence upon which the jury could have found the appellant guilty of petit theft. Under such circumstances, it is well settled that an instruction relating to a lesser degree of the crime need not be given. *People v. Ferugia*, 95 Cal. App. 711, 273 P. 99; *People v. Johnson*, 219 Cal. 72, 25 P.(2d) 408.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 23

ACKERMAN v. A. LEVY & J. ZENTNER CO.

Civ. 5189.

District Court of Appeal, Third District,
California.

May 15, 1935.

1. Sales ⇨284(1, 2)

Warranties as to nursery stock and planting seed are "prospective," relating to happening of future event and not broken until happening of such event.

2. Limitation of actions ⇨47(2)

As respects whether action for breach of warranty in sale of "Henderson bush baby lima beans for planting" was barred by limitation, warranty was that vines from seed beans when planted would produce beans of description sold (Code Civ. Proc. § 339, subd. 1).

3. Limitation of actions ⇨95(1)

As respects whether action for breach of warranty in sale of lima beans for planting was barred by limitation because not brought within two years from maturity of the vines, that plaintiff's damages were not ascertained at time of maturity of vines did not affect accrual of, or his right to maintain, action (Code Civ. Proc. § 339, subd. 1).

4. Limitation of actions ⇨47(2)

Action for breach of warranty in sale of "Henderson bush baby lima beans for planting" held barred by limitation, where action was not commenced within two years from maturity of vines, when vines did not produce beans of variety described (Code Civ. Proc. § 339, subd. 1).

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by W. W. Ackerman against A. Levy & J. Zentner Company. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Butler, Van Dyke & Harris, of Sacramento, and Dreher & McClellan, of San Francisco, for appellant.

Fred C. Pugh, of Red Bluff, for respondent.

COATS, Justice pro tem., delivered the opinion of the court.

This is an action for breach of warranty. The case was tried by the court without a jury, and judgment was rendered in favor of plaintiff.

The plaintiff for many years resided at Gerber, a country town in Tehama county, and conducted a general store there. At the time of the transaction complained of, he had sold this store on contract to a Mr. Stillwell, but was about to retake the possession and operation thereof. On June 14, 1929, Byron D. Bryan called at the store and inquired for Henderson bush baby lima beans for planting. Stillwell did not have a sufficient quantity on hand, and plaintiff undertook to secure the beans. He telephoned to the defendant A. Levy & J. Zentner Company, a corporation, at their office in Chico, Cal., and ordered the beans, 13 sacks in all, explaining that they were for seed planting. The beans were delivered to the store and charged to, and paid for by, plaintiff. Although not known to plaintiff at the time, David Jones was a partner of Bryan. Jones and Bryan planted the beans on land near Elder creek and within several miles of Gerber. In the month of July, 1929, Jones noticed that the vines were runners and not of the bush variety, and apparently then determined they were not true to name. They were inspected in August or early September, 1929, by the county agricultural agent and also by the county horticultural commissioner.

The vines were not of the variety ordered, and the crop produced was not merchantable. The beans were not harvested, but the crop, such as it was, reached its maturity not later than October or November of the year 1929. Bryan and Jones on March 8, 1930, brought suit against Levy & Zentner for breach of warranty. This case was tried February 16, 1931. Plaintiff testified in this action, and was served with a subpoena a few days before the trial thereof. The judgment in this first case was in favor of the defendants herein, and thereafter Bryan and Jones brought an action against this plaintiff, in which action they recovered a judgment of \$2,050 and costs amounting to \$35.30. This judgment was entered on February 18, 1932. Thereafter, on June 1, 1932, plaintiff brought this present action in which he received judgment for the sum of \$2,085.30.

No error was committed by the court in the admission of the evidence of the witnesses Lewis and Smith, nor in the admission into evidence of the judgment roll in the action of Bryan and Jones against Ackerman. Manifestly plaintiff's damage could not be greater than the amount which he was compelled to pay to Bryan and Jones, and the judgment roll was admissible for this purpose. The evidence also sustains the finding of the court that the sale was made by defendant to plaintiff and not to Stillwell.

The defendant pleaded that the action was barred by the provisions of section 339, subd. 1, of the Code of Civil Procedure, having not been commenced within two years after the accrual thereof, and now relies upon this defense. It claims that the cause of action accrued when the fact that the beans were not true to name was discovered, and in all events not later than when the beans had matured and were ready for harvest. Plaintiff claims that his action accrued when he first ascertained that the vines were not true to name. He claims that he had no knowledge of the fact that the vines were not true to name until a few days before February 16, 1931, when he was served with a subpoena in the first action brought by Bryan and Jones. The court found in accordance with contention of plaintiff and against the defendant upon its plea of the statute.

The action is based upon defendant's breach of warranty. No issue of fraud is presented by the pleadings or the evidence.

[1] A warranty is contractual in its nature. Plaintiff in his brief states that he has deliberately avoided exact definition of the warranty, the breach of which is the foundation of his claim, believing that the precise terms thereof are foreign to the decision in this case. Plaintiff seeks damages for breach of contract, and defendant has set up the statute of limitations. To decide this issue, this court must determine the nature of the warranty. Warranties as to nursery stock and planting seed are either present, and broken as soon as made, if at all, or prospective relating to the happening of a future event and not broken until the happening of that event. The courts of this state hold such warranties to be prospective.

[2] The two leading California cases upon this subject are *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 P. 412, 42 Am. St. Rep. 125, and *Firth v. Richter*, 49 Cal. App. 545, 196 P. 277. *Shearer v. Park Nursery Co.* did not involve the statute of limitations, but is authority upon the question as to the nature of the warranty and when the breach occurred. It holds that the warranty was that the trees, when planted, would produce a certain kind of fruit, and that the breach occurred when the trees first bore a different kind of fruit. In the *Firth v. Richter* Case the contract was for the sale of "Valencia orange trees," and the bar of the statute of limitations was pleaded, and the court there held that the warranty was that the trees would bear the kind of fruit corresponding to the description. In this last case the court relied upon the case of *Ingalls v. Angell*, 76 Wash. 692, 137 P. 309, where a warranty that trees sold were Carman peach trees was held to be a warranty that the trees would produce peaches of that variety. The like rule applies to seed for planting. The warranty in this present case was that the vines from the seed beans when planted would produce beans of the description sold. The breach of warranty under these decisions occurred not later than the maturity of the vines, which would be more than two years prior to the date of the filing of the complaint in this action.

Plaintiff relies upon the language contained in these and other decisions to the effect that the breach occurred at the date when the purchaser discovered, or with ordinary care and attention could have discovered, the breach of warranty. The language in itself is but a statement of the

general rule applicable to prospective warranties, and followed by the courts generally to determine the future event upon the happening of which the breach or fulfillment of the warranty may be determined. In each instance the warranty is definite and the future event ascertained at the time the warranty was given. Applying this rule, the courts in those jurisdictions where the doctrine of prospective warranty has been adopted have held that the warranty is that the trees or vines at maturity will produce fruit or seed true to name, and that the warranty is broken when at maturity fruit or seed of a different variety is produced.

The same reasoning applies to the sale of other chattels, as in the case of the *German Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 P. 319, when fruit was sold to be delivered and inspected at an Eastern market, and the court held that the breach occurred at the time of the delivery and inspection, that being the future event, reasonably in contemplation of the parties when the facts of the warranty should have been discovered. The same rule applies to the sale of machinery upon warranty, the cause of action accruing when the machinery is put to reasonable use and the purchaser discovers, or could have with ordinary care discovered, its defects, that being the future event to which the warranty relates.

[3] The courts in these cases lay down a general rule for the accrual of such causes of actions, and it is not their function to exempt any particular case from the applicability of such rules. The doctrine of prospective warranty was adopted in the interests of justice and to prevent the statute from being a protection for fraud so that the bar of the statute would not run before the existence of the cause of action was ascertained. See notes to *Heath v. Moncrief Furnace Co.*, in 75 A. L. R. at page 1082 et seq. This court does not now disturb the findings of the trial court. However, a recital of the facts of the case serves to illustrate that a person in plaintiff's position in a town and county the size of Gerber and Tehama county under similar circumstances would ordinarily have notice of the breach of warranty almost upon the happening of the breach itself and long before the time when the action would be barred by the statute of limitations, and would ordinarily not suffer any hardship by

the application of the law to his particular case. In fact, by plaintiff's own testimony he had such notice some considerable time before the action was in fact barred. Plaintiff complains of the injustice that the law, as so declared, will work upon him. This injustice is not a result of the law, but of plaintiff's failure, after learning of the breach, to bring his action within the time prescribed by statute. The fact that his damages were not then ascertained did not, of course, affect the accrual of, or his right to maintain, the cause of action. *Latin v. Gillette*, 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115.

[4] The warranty was that the vines at maturity would produce beans of the variety described. Upon the vines reaching maturity in this case, the warranty was broken and the cause of action accrued. Plaintiff's action, not having been commenced within two years after the happening of this event, is barred by the statute of limitations.

The judgment is reversed, with directions to the trial court to find for defendant upon its plea of the statute, and to thereupon enter judgment for defendant.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 730

Ex parte MOONEY.

Cr. 1846.

District Court of Appeal, First District,
Division 1, California.

May 14, 1935.

1. Habeas corpus ☞22(1)

Conviction could not be set aside upon ground that it was predicated upon perjured testimony or because material evidence was concealed or suppressed, since fraud so practiced both on state and on accused was not fraud extrinsic to record, in which case only could such relief be had.

2. Habeas corpus ☞22(1)

Where conviction was result of perjured testimony or of material evidence being concealed or suppressed, only remedy rested with Governor under his pardoning power.

3. Courts ⇨97(1)

District Court of Appeal *held* without jurisdiction to grant writ of habeas corpus to prisoner, even though language of decision of Supreme Court of United States required it, where to grant writ would overrule decisions of state Supreme Court, since any departure from established legal doctrine declared by state Supreme Court must have its origin in such court.

CASHIN, J., dissenting.

Proceeding on the application of Thomas J. Mooney for writ of habeas corpus.

Writ denied.

Davis & Freed, of San Francisco, for petitioner.

TYLER, Presiding Justice.

Habeas corpus. Petitioner has applied to this court for a writ of habeas corpus. A similar petition was presented to the superior court in and for the county of Marin and was denied.

[1-3] Petitioner was regularly convicted of the crime of murder. The judgment of conviction was subsequently affirmed on appeal, and it became final. It is claimed in the instant proceeding that the judgment of conviction was procured without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States by reason of the alleged fact that it was obtained through perjured testimony, which testimony was known by the prosecuting officers at the time it was presented to be perjured. This precise question has been before the Supreme Court of this state under various petitions, and that court has uniformly held that a judgment cannot be set aside upon the ground that it is predicated upon perjured testimony or because material evidence is concealed or suppressed; that fraud so practiced both on the state and on him against whom the judgment is pronounced is not such fraud as is extrinsic to the record; and that it is only in cases of extrinsic fraud that such relief may be had. The remedy in such a case, says the Supreme Court, rests only with the Governor of the state under his pardoning power, and he alone can afford relief. *People v. Mooney*, 175 Cal. 666, 166 P. 999; *Id.*, 176 Cal. 105, 167 P. 696; *Id.*, 177 Cal. 642, 171 P. 690; *Id.*, 178 Cal. 525, 174 P. 325. Since the rendition of the decisions in these cases, petitioner herein has applied to the Supreme Court of the United States for a

writ of habeas corpus upon the identical grounds as are here alleged. *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791. This petition was denied without prejudice, and the present application is based upon language used in the decision in that proceeding. To adopt the construction of that language, as contended for by counsel for petitioner, would compel the granting of a writ of habeas corpus by this court upon the grounds set forth in the petition, which action would overrule the decisions of our Supreme Court above cited, by which this court is obviously bound. We do not, however, agree with the contention of counsel as to the effect of the decision in the case of *Mooney v. Holohan*, above cited. It follows, therefore, that, if by reason of the decision of the Supreme Court of the United States there shall be a departure from the established legal doctrine declared by the Supreme Court of this state in the cases above cited, such departure must necessarily have its origin in that court.

For the reason given, the writ is denied.

I concur: KNIGHT, J.

CASHIN, Justice.

I dissent. The petition alleges, among other things, that the verdict of the jury, judgment of conviction, sentence, commitment, imprisonment, and restraint of petitioner were obtained by the state of California by means of the presentation against him, through its then district attorney and his assistants, of the perjured testimony of certain witnesses; that such testimony was known by said district attorney and his assistants to be perjured at the time it was offered and upon which said conviction was had; further, that said testimony was the sole testimony received at the trial which purported in any way to connect the petitioner with the bomb in question; that petitioner did not discover, and could not by reasonable diligence have discovered, previous to the denial of his motion for a new trial and his appeal to the Supreme Court of the state of California, the evidence proving said testimony to be perjured. Substantially the same allegations were contained in a petition which petitioner moved for leave to file in the Supreme Court of the United States in a proceeding entitled *Mooney v. Holohan et al.*, reported in 294 U. S. 103, 55 S. Ct. at page 340, 342, 79 L. Ed. 791. In response to a rule to show cause why leave to file the petition should not be

granted, respondent Holohan made return by the Attorney General of this state. The return did not put in issue the facts alleged in the petition, but was in the nature of a demurrer, which alleged that petitioner had failed to raise a federal question. In reply to this contention, the court said that, if a state has contrived a conviction through the pretense of a trial which in truth was but used as a means of depriving the defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured, such a contrivance to procure conviction and imprisonment of the defendant is as inconsistent with the rudimentary demands of justice as the obtaining of a like result by intimidation; that the action of prosecuting officers on behalf of a state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment, since the amendment governs any action of a state, whether through its Legislature, its courts, or its executive or administrative officers, and the argument that in the circumstances set forth in the petition the state was not required to afford any judicial process to remedy the alleged wrong could not be sustained. The court pointed out that the state of California had not failed to provide a corrective process by habeas corpus (Const. Cal., art. 1, § 5; art. 6, § 4), that the decisions of the state Supreme Court in relation to petitioner's conviction, namely, *People v. Mooney*, 175 Cal. 666, 166 P. 999, *People v. Mooney*, 176 Cal. 105, 167 P. 696; *People v. Mooney*, 177 Cal. 642, 171 P. 690, and *People v. Mooney*, 178 Cal. 525, 174 P. 325, dealt with questions within the limitations of particular appellate procedure, and that no decision had been brought to its attention holding that the state court is without power to issue the writ when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States, it being the duty of such courts, equally with the federal courts, to enforce every right secured by that Constitution (*Robb v. Connolly*, 111 U. S. 624, 4 S. Ct. 544, 28 L. Ed. 542); further, that despite the many proceedings taken on behalf of the petition, no application for a writ of habeas corpus to the state courts had been made, nor was it shown that the writ was unavailable, and that recourse must be had to whatever judicial remedies the state afforded before applying to the federal court for relief.

It is provided by our statute that every person unlawfully imprisoned or restrained of his liberty under any pretense whatever may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint (Pen. Code, § 1473); and it is within the power of the state courts having jurisdiction in such a proceeding to inquire into the legality of such imprisonment or restraint, and afford relief if the same be ascertained to be illegal, notwithstanding that the illegality may arise from a violation of the Constitution of the United States. *Robb v. Connolly*, supra.

The decisions of the Supreme Court of the United States are binding and conclusive on the courts of the several states on the question what constitutes due process under the Federal Constitution. 15 Cor. Jur., Courts, § 318, p. 930; *Brookes v. City of Oakland*, 160 Cal. 423, 424, 117 P. 433. While *Mooney v. Holohan*, supra, is not a decision directly upon that question, nevertheless the observations of the court are strongly persuasive and clearly show the duty of this court in the premises.

With the question of the effect of a denial of the allegations of the petition we are not now concerned, but only with the sufficiency of the petition to warrant the issuance of the preliminary writ. It is the rule that, where the petitioner alleges facts which, if true, entitle him to discharge from custody or restraint, a preliminary writ should issue. In *re Clary*, 149 Cal. 732, 87 P. 580. How far this court may go in an attempt to ascertain the truth of the allegations in the event they should be controverted will be a matter for future consideration; but if, as the court said in *Mooney v. Holohan*, supra, " * * * a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation," and it is admitted or can be proved that a citizen has been deprived of his liberty through a fraud of the kind here alleged, whether the same be in its nature intrinsic or extrinsic, then no general rule based on expediency, however desirable in civil cases, should prevent a judicial investigation of the facts and the granting of appropriate relief. At all events, it seems plain, in view of the language of the opinion in the case last cited, that the facts alleged show petitioner to be entitled to review in this proceeding, and I am of the opinion that the preliminary writ should issue.

6 Cal.App.2d 702

PALMA v. LESLIE et ux.
Civ. 5265.District Court of Appeal, Third District,
California.

May 13, 1935.

Hearing Denied by Supreme Court
July 11, 1935.**1. Evidence ⇨397(2)**

Complete and certain written agreement importing legal obligation will, in absence of fraud, accident, or mistake, be conclusively presumed to contain whole of agreement between parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations, or statements will not be received for purpose of adding to or varying written instrument (Civ. Code, § 1625).

2. Evidence ⇨450(5)

When seeming uncertainties can be removed from contract by application of statutory or other established rules of interpretation, instrument is not ambiguous, so as to justify resort to parol evidence (Civ. Code, § 1625).

3. Evidence ⇨448

Court may resort to parol evidence, not to void or vitiate apparent conflicting provisions of instrument, but to harmonize them, and, when possible, give meaning and effect to each (Code Civ. Proc. § 1858).

4. Escrows ⇨6

Provision, in escrow instructions for exchange of realty, that parcel should be free of incumbrances except assessments of record but not delinquent and condemnation proceedings for street purposes, was not "particular" within statutory rules of construction, so as to supersede prior provision that parcel was subject to all assessments of record, and condemnation proceeding for street purposes (Code Civ. Proc. § 1859).

[Ed. Note.—For other definitions of "Particular," see Words & Phrases.]

5. Evidence ⇨458

In action to recover money paid for delinquent assessments against former owner of realty conveyed pursuant to exchange contract, parol evidence respecting preliminary negotiations held admissible to explain ambiguity in escrow instructions, wherein one provision stated that realty was subject to all assessments of record and condemnation proceedings for street purposes and subsequent provision stated that realty should be free of incumbrances except assessments of record but not delinquent and condemnation proceedings for street purposes (Civ. Code, § 1625; Code Civ. Proc. § 1858).

6. Evidence ⇨433(1)

Parol evidence is admissible under pleadings averring mutual mistake.

7. Evidence ⇨433(1)

In action to recover money paid for delinquent assessments against former owner of realty conveyed pursuant to exchange contract, parol evidence as to preliminary negotiations held admissible to explain ambiguous escrow instructions under cross-complaint seeking reformation of deed because of mutual mistake, since court was justified in considering instructions and deed as one instrument (Civ. Code, § 1642).

8. Evidence ⇨186(6)

In action to recover money paid for delinquent assessments against former owner of realty conveyed pursuant to exchange contract, copy of exchange contract bearing only signature of defendant, who testified that he had seen plaintiff's signature on original but had not seen plaintiff sign it and was not familiar with plaintiff's handwriting, held inadmissible for lack of sufficient foundation.

9. Appeal and error ⇨1050(1)

In action to recover money paid for delinquent assessments against former owner of property conveyed pursuant to exchange contract, admission of copy of exchange contract without sufficient foundation held harmless.

10. Appeal and error ⇨1008(3)

In action to recover money paid for delinquent assessments against former owner of realty conveyed pursuant to exchange contract, where court's construction of contract, that it was parties' intention that realty should be accepted by plaintiff subject to assessments, was reasonable and sustainable by language of instrument, reviewing court would not substitute another interpretation, though it might seem equally tenable.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Ferdinand Palma against William Leslie and wife, wherein defendants filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

Chas. H. Brock and Earl E. Johnson, both of Los Angeles, for appellant.

Spencer Austrian, of Los Angeles, for respondents.

WOODWARD, Justice pro tem., delivered the opinion of the court.

Plaintiff, Ferdinand Palma, appeals from a judgment denying him the relief sought, and decreeing the reformation of a certain deed as prayed for by defendants in their

cross-complaint. Originally, appellant's action was instituted for the purpose of obtaining a vendor's lien upon real property conveyed by him to respondents, pursuant to the terms of a contract of exchange. After the complaint had been amended several times the parties ultimately filed a written stipulation, wherein appellant waived his right to the specific lien demanded, and agreed, in lieu thereof, that respondents should deposit the sum of \$15,000 with an escrowee to guarantee satisfaction of judgment for the amount of said lien should appellant prevail in the action.

The sole question presented for determination here is whether the trial court committed error in the admission of parol evidence.

Points relied on for reversal narrowly delimit the field of inquiry, and make an elaborate presentation of facts unnecessary. Succinctly stated, the controversy between the parties involves the question of whether respondents' property was to be accepted by appellant subject to all street assessments of record, or merely to such assessments of record as were not delinquent on March 5, 1930, the date the transaction was consummated.

The escrow instructions contain two seemingly contradictory provisions which we place in juxtaposition for the sake of clarity. Under the printed caption, "following are the legal descriptions of the properties, the title conditions under which each parcel will be conveyed, its appraised value and the value of the equities conveyed in so far as this escrow is concerned," it is stated that parcel 1 (property transferred by respondents) is subject to "taxes for 1930, 1931, conditions, restrictions, reservations, rights-of-way, and easements of record—all assessments of record, and any proceedings for condemnation of right-of-way for street purposes." The last clause, which we have italicized, is typewritten. On page 2 of the escrow instructions, under the general subject of title insurance, is a provision, also typewritten, that said parcel one shall be free of encumbrances except "*any assessments of record but not delinquent and any proceedings for right-of-way or condemnation for street purposes.*" The typewritten or italicized portion of the first provision readily suggests that the parties believed the printed stipulations necessitated an amendment to meet the particular requirements of the transaction. Respondents' grant deed to appellant, bearing the same

date as the escrow instructions, makes no mention of assessments delinquent or otherwise, but does recite that the property conveyed is "subject to taxes for the fiscal year 1930-31, conditions, restrictions, reservations, rights, and rights-of-way of record."

Shortly after the exchange of properties had been completed the appellant discovered for the first time, so he averred in his complaint, that the parcel received by him was encumbered with delinquent assessments of record aggregating the sum of \$9,948.09 placed thereon by the city and county of Los Angeles for the improvement of Beverly boulevard, whereas he had expected to pay, relying upon the escrow agreement, approximately \$2,800 for an assessment covering a different public project and not delinquent. Thereafter, on August 13, 1931, appellant obtained a loan from the Realty Tax & Service Company, a corporation, and as security therefor mortgaged the property in question. The corporation, it seems, eventually induced the city of Los Angeles to accept payment of such delinquent assessments without penalty. Appellant thereupon instituted the present action, claiming that he was liable, under the terms of the mortgage, to the Realty Tax & Service Company for the amount paid on account of the assessments. Respondents filed an answer and cross-complaint setting forth "that by mistake of the scrivener who drew the deed and by the mutual mistake of cross-complainants and cross-defendant," said deed failed to recite that said property was conveyed subject to "all assessments of record and any proceedings for condemnation of right-of-way for street purposes * * *," and praying for a reformation of the instrument to the end that it might "properly describe the conditions under which said properties were conveyed."

During the trial of the cause respondents contended that the contract of exchange, to which we will allude later, the escrow agreement, and the deed, all bore the same date, grew out of the same transaction, and should be read together as one agreement. Consistent with this position respondents offered, and the court admitted, over the objection of appellant, parol evidence with respect to preliminary negotiations between the parties and their situation at the time the transaction was consummated, such evidence being received on the theory that the escrow instructions were ambiguous, and that parol evidence was

necessary to remove the ambiguity and ascertain the intent of the parties. It was appellant's position, then, as it is now, that such testimony was clearly inadmissible and constituted prejudicial error; that the essential question for the court was not one of explanatory evidence, but of the proper construction of a definitely worded contract. And in this connection appellant urged that the second of the disputed provisions in the escrow agreement was special or particular in character and, under statutory rules of construction, should govern as against the former general provision.

[1,2] Eliminating, for the moment, any reference to the deed or agreement of exchange, can it be said that the escrow instructions were so ambiguous as to legally justify the introduction of explanatory parol evidence? Merely because a contract may appear ambiguous by reason of loose phrasing, or mutually repugnant provisions, manifestly does not in every instance justify a resort to parol evidence. If the rule were otherwise, endless confusion would result. As pointed out in an early case by Justice Story,¹ wherein he was attempting the delicate task of differentiating between patent and latent ambiguities—"if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not construe, the contract. You attempt to do that for the party which he has not chosen to do for himself; and the law very properly denies such an authority to courts of justice." 4 Jones' Commentaries on Evidence (2d Ed.) p. 2828. Or, as stated by the late Justice Henshaw, in *United Iron Works v. Outer H., etc., Co.*, 168 Cal. 81, 85, 141 P. 917, 920: "The rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument." See, also, section 1625, Civ. Code; *Carlson v. Security Trust & Savings Bank*, 205 Cal. 302, 271 P. 104; *Calpetro Producers Syndicate v. Chas. M. Woods Co.*, 206 Cal. 246, 274 P. 65; *Kunz v. Anglo & London Paris National Bank*, 214 Cal. 341, 5 P.(2d)

417. It is rudimentary, of course, that when seeming uncertainties can be removed from a contract by the application of statutory or other established rules of interpretation, the instrument, in law, is not ambiguous.

[3] On the other hand, there are contractual situations in which the court may resort to parol evidence, not to void or vitiate the apparent conflicting provisions of an instrument, but to harmonize them, and, when possible, give meaning and effect to each and all. Section 1858, Code Civ. Proc.; *Lassing v. James*, 107 Cal. 348, 40 P. 534. Keeping in mind its limitations, this salutary general rule is well stated in Jones' Commentaries on Evidence, *supra*, at page 2851: "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, to view the circumstances as they viewed them in order to judge the meaning of the words and the correct application of the language to the things described. Hence, it is frequently necessary, in order to construe written instruments, to receive evidence of accompanying facts, other than those which serve to apply the instrument to the subject-matter or the persons intended. Under some circumstances, not only the situation and relation of the parties, but also their acts, negotiations and statements, may be proved as part of the surrounding facts which throw light on the transaction."

[4] That the escrow instructions in question are ambiguous cannot be gainsaid. The respondents, not unmindful of the rule of interpretation contained in section 1859 of the Code of Civil Procedure, and already referred to here, naively suggest that the conflicting provisions were intended to refer to two separate matters, the first to the title conditions, and the second to disbursements and title insurance. While not fully appreciating the subtle distinction attempted by respondents, we are nevertheless convinced that the rule of construction urged by appellant is inapplicable to the contract in question. It does not reasonably appear, we think, that the second provision of the escrow instructions is "particular" in the sense intended by section 1859 of the Code of Civil Procedure, and for that reason it

should not supersede or vitiate the language of the former provision. Insertion of the typewritten clause, "any assessments of record but not delinquent," might well indicate that appellant had knowledge of the delinquencies and sought to avoid the payment of penalties. If the parties intended, by the use of such clause, that the Beverly boulevard assessments should not be paid by appellant, it would have been an easy matter, especially in view of the large sum involved, to state their agreement in simple, unequivocal language.

[5] Attention should be called to the fact that both of the provisions in the contract burden parcel 1 with any proceedings for condemnation or right of way for street purposes. This is a significant circumstance. The evidence discloses that on January 10, 1930, the respondent and others commenced an action against the city of Los Angeles wherein they sought to invalidate the assessment in dispute here. At the time appellant and respondents exchanged properties, this suit was pending, and while it was not an action in condemnation, it was at least a proceeding, and its pendency on March 5, 1930, might reasonably account for a portion of the phraseology employed in both provisions of the escrow instructions. It would seem, therefore, that appellant's contention that he was expressly relieved from paying the Beverly boulevard assessments, all of which were delinquent, is repugnant to, and wholly inconsistent with, the stipulation that he was to accept parcel 1 subject to "any proceedings for right-of-way or condemnation for street purposes." In these circumstances the court did not err in resorting to parol evidence to explain the ambiguity in the escrow instructions.

[6-9] Then, too, there was another reason which justified the ruling. As already pointed out, respondents filed a cross-complaint which averred that, because of mutual mistake, the deed should be reformed. When mistake is put in issue by the pleadings, and the same is mutual, the court may resort to parol evidence. *Harding v. Robinson*, 175 Cal. 534, 166 P. 808. The fact that the cross-complaint was addressed to the deed, to the apparent exclusion of the escrow instructions, is immaterial. These instructions, standing alone, were sufficiently ambiguous to necessitate explanatory testimony. Moreover, the court was justified in considering the instructions and the deed

as one instrument. Section 1642, Civ. Code. A third instrument, the contract of exchange, was also received in evidence over the objections of appellant. This instrument bore only the signature of respondent William Leslie, who testified that he had seen the appellant's signature on the original copy, but admitted that he had not seen appellant sign the same, and was not familiar with his handwriting. The foundation for the introduction of the document was insufficient, and the court should have sustained appellant's objection thereto. The error, was, in our opinion, harmless.

[10] Appellant was not called as a witness. Respondent Leslie testified that during the negotiations with appellant, he advised the latter that parcel 1 would be exchanged subject to all assessments of record. The exchange agreement, which he claimed appellant signed, but which does not bear the latter's signature, provided that respondents' property was to be exchanged "subject to assessments of record and proceedings with reference to rights-of-way and leases now on property." A. C. Pearlman, the real estate broker who dictated the escrow instructions, testified that he secured his data from the agreement of exchange, and intended to follow the provisions of that alleged agreement. He admitted that he had received no instructions from the parties to incorporate in said escrow agreement any provision with reference to delinquent assessments. This was done, so he averred, on his own responsibility and in conformity with "the spirit of the contract from the conversation I had with both parties."

With the aid of testimony, to which we have but briefly referred, the court found that it was the intention of the parties that parcel 1 should be accepted by appellant subject to all assessments of record and subject to the suit which respondent and others had instituted to test the validity of said assessments. The court also found that respondents' deed should be reformed to express the actual intent of the parties with respect to the transaction.

We conclude that it was not error for the trial court to permit the introduction of oral evidence bearing upon the question of the intention of the parties. We feel, also, that the construction placed upon the contract, as evidenced by the findings, is reasonable and sustainable by the language of the instrument. When this is true an appellate

court will not substitute another interpretation, though it may seem equally tenable. *Payne v. Pathe Studios, Inc.* (Cal. App.) 44 P.(2d) 598.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 743

MANFORD v. COATS.

Civ. 5292.

District Court of Appeal, Third District,
California.

May 14, 1935.

1. Witnesses ☞144(11)

In action against executor for services rendered decedent by plaintiff's wife, admission of testimony regarding agreement with decedent made prior to date of enactment of statute giving wife present interest in community property *held* not error (Code Civ. Proc. § 1880, subd. 3; Civ. Code, § 161a).

2. Trial ☞69

Permitting plaintiff, after presentation of motion for nonsuit, to reopen case and supply specified deficiencies *held* proper.

3. Executors and administrators ☞449

In action against executor for services rendered to decedent by plaintiff's wife, material variance from allegations of complaint respecting wife's services and decedent's agreement to compensate wife therefor *held* not shown (Code Civ. Proc. § 469).

4. Executors and administrators ☞205(2)

Decedent's agreement to compensate plaintiff's wife for services in his will *held* to warrant recovery of reasonable value of services where no will was made.

5. Limitation of actions ☞46(5)

Under agreement that promisee was to care for promisor as long as he lived and promisee would then be compensated by provision in promisor's will, limitation would not begin to operate on agreement against promisee until promisee had fulfilled his contract (Code Civ. Proc. §§ 337, 339, 1973, subd. 6).



Appeal from Superior Court, Sutter County; Warren Steel, Judge.

Action by B. B. Manford against Arthur Coats, as the executor of the last will and testament of William M. Strange, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lloyd E. Hewitt, of Yuba City, and Edward D. Keil, of San Francisco, for appellant.

McDaniel & Mahon, of Marysville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by the executor of the last will and testament of William M. Strange, deceased, from a judgment rendered in favor of plaintiff and against the executor, awarding to plaintiff the sum of \$1,650 for services rendered decedent during his lifetime by the wife of plaintiff.

The facts briefly summarized are that B. B. Manford and Lelia B. Manford were at all the times mentioned in the action, husband and wife. In 1919, William M. Strange, then a man advanced in years, came to the home of plaintiff and asked if he could make his home there. Consent was given and Strange moved into the home of plaintiff and remained there until his death in 1933. Apparently nothing was said about compensation when Strange first came, but after he had been there three or four years he told plaintiff and his wife that if they would take care of him as long as he should live, he would provide for them. On several subsequent occasions he repeated this promise to the wife of plaintiff and also made similar statements to Frank Allen, an old friend of his, and Berkeley Manford and Van Camp Manford, sons of plaintiff, although none of these latter witnesses fixed any definite time at which these statements were made. We may add that the trial court made general findings supporting the claim of plaintiff that Lelia B. Manford performed services for William M. Strange who promised her if she would permit him to live in her home and receive such services as she might render during the remainder of his life he would pay her a reasonable sum therefor by having inserted in his will an adequate amount to compensate her. The court also found that deceased lived the balance of his life at the home of plaintiff, but failed to make

any provision in his will for the services rendered, and that nothing was paid on account thereof.

Appellant urges as grounds for reversal, first, error in permitting Mrs. Manford, wife of plaintiff, to testify over the objection of defendant as to matters or facts occurring before the death of Strange. Secondly, error in denying defendant's motion for nonsuit. Thirdly, a fatal variance between the allegations in the complaint and the proof, and, lastly, that the claim is barred by subdivision 6, § 1973, of the Code of Civil Procedure, and by sections 337 and 339 of the Code of Civil Procedure. We will discuss these points in the order named.

It is the contention of appellant that the wife of plaintiff cannot testify since the amendments to sections 1401 and 1402 of the Civil Code, now sections 201 and 202 of the Probate Code, and the enactment of section 161a of the Civil Code.

[1] The objection to the testimony of Mrs. Manford is taken under subdivision 3 of section 1880 of the Code of Civil Procedure, which reads:

"The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." Mrs. Manford testified to matters occurring before the death of Strange, and appellant charges the action is one in which she is interested as well as one brought in her behalf, and therefore comes within the inhibition set forth in the foregoing section.

Prior to the enactment of section 161a of the Civil Code, the wife had no present interest in the community property and therefore in an action by her husband was not prohibited from testifying by section 1880 of the Code of Civil Procedure. *Badover v. Guaranty Trust & Savings Bank*, 186 Cal. 775, 200 P. 638; *Moseley v. Heney*, 66 Cal. 478, 6 P. 134.

In 1927, section 161a of the Civil Code was enacted as follows:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the hus-

band as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." However, in *Stewart v. Stewart*, 204 Cal. 546, 269 P. 439, 442, the court, in considering the origin and nature of a wife's community rights, said: "This section of the Code [section 161a, Civ. Code], whatever effect it may have upon community property acquired subsequent to its effective date, cannot in any manner relate to or govern the ownership of property acquired prior thereto."

When Mrs. Manford was asked on direct examination what Mr. Strange said when he came to the house and requested the privilege of living with them, appellant objected to the question upon the ground that it was incompetent, prohibited by section 1880, subd. 3, of the Code of Civil Procedure, and was at variance with the pleadings and not within the issues to be proved, self-serving, and barred by subdivision 6, § 1973, of the Code of Civil Procedure, and subdivisions 1 and 2 of section 337 of the Code of Civil Procedure, and by the provisions of section 339 of the Code of Civil Procedure. These objections, however, were overruled subject to the right to later move to strike out if desired. It was also stipulated that the same objections would be deemed to have been made to all questions along a similar line. Mrs. Manford then continued, stating that Mr. Manford objected on the ground that they did not have sufficient room. Mr. Strange said it was the only home he had and that he had no one to take care of him, so he was permitted to move in. Nothing was said at that time about payment. After Strange had been in the Manford household three or four years, he told Mrs. Manford if they would take care of him he would provide for them, and upon another occasion said, "You and Ben take care of me as long as I live and I will see you are well provided for," which statements he repeated to Mrs. Manford and others on numerous occasions. The witness also testified she was not related to Strange and would not have rendered the service if she had not believed the statements of deceased. She also testified she received nothing for taking care of Strange except to receive from time to time payments of \$5 "to help pay for lights and water," but kept no record of the total thus paid. She further testified that \$3,000 was a reasonable amount

for the services rendered, which consisted of the use of a room, doing his mending, caring for him when sick and ailing, furnishing many of his meals, taking them to his room when he was unable to come to the table, and accorded him such further care and attention as she would a member of her family.

Inasmuch as all that Mrs. Manford testified to regarding the agreement with the deceased occurred prior to 1927, the date of the enactment of section 161a of the Civil Code, we can see no error in admitting the testimony. Whether or not, however, her testimony were to be excluded, it would not be fatal to the cause of action as other witnesses testified to practically the same statements made to them by deceased at various times. Too, if Manford and Strange entered into a valid contract or agreement, Mrs. Manford cannot be deprived of the right to establish that agreement by the enactment of a later legislative act. *Matter of Estate of Patterson*, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; *Morris v. Pacific Electric Ry. Co.* (Cal. Sup.) 43 P.(2d) 276.

[2] Appellant next complains because the court, after the presentation of their motion for a nonsuit, permitted respondent to reopen their case and supply the specified deficiencies. Not only was this proper, but to have refused to have granted respondent that right might have constituted error. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 P. 289.

[3] The complaint, which closely follows the averments of the claim filed with the executor, alleges in paragraph VIII that between certain dates "the said Lelia B. Manford performed services and furnished home comforts and care, company and companionship to said William M. Strange * * * at the special instance and request of said William M. Strange of the reasonable value of the sum of Three Thousand Dollars (\$3,000.00)."

"IX. That said William M. Strange promised and agreed with said Lelia B. Manford if she would permit him to live in her home * * * and enjoy the home comforts * * * and receive such services as she might render him during the remainder of his life that he would pay her therefor a reasonable and adequate sum by having inserted in his Last Will and Testament a testamentary bequest * * * in

an amount adequately sufficient to compensate them. * * *" Then follows an allegation in paragraph X that pursuant to said agreement said William M. Strange lived in the house of plaintiff until his death and that during all of said times Lelia B. Manford kept and performed all of the agreements she had covenanted to perform.

We believe the allegations are in substance for the reasonable value of services rendered. If there does exist a variance between the allegations in the complaint and in the proofs adduced, we deem it an immaterial variance as appellant could not have been misled thereby. Section 469 of the Code of Civil Procedure, referring to variance, provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * *"

[4] The case of *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84, seems to be conclusive that if services are rendered on the understanding of the parties that they were to be compensated therefor in the will of deceased, said agreement is sufficient to warrant a recovery for the reasonable value of such services where no such will was made. This case was followed in the case of *Rutherford v. Peppas*, 53 Cal. App. 309, 199 P. 1111, 1112, the court there saying: "The recent case of *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84, was an action in which the plaintiff attempted to recover for the breach of an agreement to make provision by will for payment for services. It was held that, although recovery could not be had upon that theory, the nonsuit was, nevertheless, improper, as plaintiff was not without his remedy. It was held that plaintiff was entitled to the reasonable value of his services upon the theory that where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the part of the party receiving the benefit to pay the reasonable value of whatever has been received under the contract."

Appellant refers us, however, to the case of *Giles v. Reed*, 44 Cal. App. 367, 186 P. 614, where the court refused to receive evidence of the reasonable value of

services, but in that case the agreement was to compensate plaintiff by devising a specific parcel of real property, and no claim was based on the implied contract, whereas, in the instant case, the agreement was to see that the parties, in consideration of services rendered by plaintiff at the request of deceased, were well provided for.

[5] Appellant sets up the several statutes of limitations that might be applicable to the situation, but inasmuch as the agreement was to care for the promisor as long as he lived, and that the promisee would then be compensated by a provision in the will, the statutes of limitation would not begin to operate until the promisee had fulfilled his contract.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



ADAMS v. SOUTHERN PAC. CO. et al. *
Civ. 1530.

District Court of Appeal, Fourth District,
California.

April 29, 1935.

Hearing Granted by Supreme Court
June 28, 1935.

1. Automobiles ⇨306(2)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, evidence that county's failure to erect barrier or warning sign near crossing created dangerous condition because paving was narrower over crossing than was highway immediately adjacent to crossing *held* to support finding that county was negligent (Gen. Laws 1931, Act 5619, § 2).

2. Automobiles ⇨306(8)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, evidence *held* insufficient to require finding that motorist was contributorily negligent in failing to see projecting rails as he approached crossing during nighttime (Gen. Laws 1931, Act 5619, § 2).

3. Automobiles ⇨304(3)

Motorist is presumed to employ ordinary care for his own safety.

4. Automobiles ⇨304(2)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, occurrence of accident was some evidence tending to show that dangerous condition with respect to highway existed, although occurrence of accident did not raise presumption of negligence (Gen. Laws 1931, Act 5619, § 2).

5. Appeal and error ⇨101(1)

Finding of fact which is based on conflicting evidence cannot be disturbed.

6. Judgment ⇨630

Rendition of judgment in favor of county officers being sued for death of driver who was thrown from automobile which ran into projecting rails at railroad crossing upon sustaining of county officers' general demurrer to complaint *held* not to destroy right of recovery against county which was jointly sued under statute making county liable to general public for dangerous conditions of public highways (Gen. Laws 1931, Acts 5618, 5619, § 2).

7. Death ⇨85

Damages recoverable in wrongful death action are limited to pecuniary loss suffered by persons for whose benefit right of action is given (Code Civ. Proc. § 377).

8. Death ⇨84

Failure to include funeral and burial expenses in award of damages in wrongful death action *held* not error where funeral and burial expenses were paid from proceeds of life policy payable to deceased's estate, since such expenses did not constitute pecuniary loss to sole heir, notwithstanding that amount which sole heir would receive was reduced by payment for such expenses (Code Civ. Proc. § 377).

9. Executors and administrators ⇨214

Funeral and burial expenses are proper charge against estate of deceased for which estate is primarily liable (Probate Code, § 950).

10. Death ⇨101

Heir of deceased for whose death wrongful death action is maintained does not take money awarded by succession as an heir, but takes money as beneficiary of statute expressly conferring on him a right of action (Code Civ. Proc. § 377).

11. Death ⇨101

Amount recovered in wrongful death action is not part of estate of deceased, and personal representative bringing such action acts solely as statutory trustee for benefit of heirs on account of whom recovery is had (Code Civ. Proc. § 377).

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 121.

12. Death ☞84

Where funeral and burial expenses of deceased whose death has been caused by wrongful act or neglect of another have been paid from money belonging to decedent's estate, heir who is given statutory right of action to recover damages for death suffers no pecuniary loss because of payment of such expenses, and cannot recover such expenses in wrongful death action (Code Civ. Proc. § 377).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by William F. Adams, as administrator of the estate of Leo R. Schwanekamp, deceased, against the Southern Pacific Company, the County of San Bernardino and others. From the judgment, the plaintiff and the County of San Bernardino appeal.

Affirmed.

Swing & Swing and Stanley Mussell, Dist. Atty., both of San Bernardino, for San Bernardino County.

William F. Adams, of Los Angeles, and Duckworth & Harrison, of San Bernardino, for William F. Adams.

JENNINGS, Justice.

This action was instituted by the administrator of the estate of Leo R. Schwanekamp, deceased, for the purpose of recovering compensatory damages for the death of said Schwanekamp, which was alleged to have been caused by the joint negligence of the railroad company and the county of San Bernardino. The plaintiff's complaint also sought recovery of damages for loss of property and for burial expenses of the deceased. At the conclusion of the trial the court, sitting without a jury, absolved the railroad company from any liability to plaintiff and rendered judgment in plaintiff's favor against the defendant county in the amount of \$1,500 for the wrongful death of Schwanekamp, and permitted recovery of the sum of \$240 for damages to an automobile which the deceased was operating at the time the accident which resulted in Schwanekamp's death occurred. From this judgment both plaintiff and the defendant county of San Bernardino have appealed. The latter appeal will herein be first considered. A statement of the undisputed facts disclosed by the evidence is necessary for a proper

understanding of the various points urged on this appeal.

At some time between 10 o'clock and 10:30 o'clock in the evening of August 24, 1927, Schwanekamp and a woman companion set out from the city of Redlands to drive to the city of Los Angeles in a Chevrolet coupé automobile which belonged to Schwanekamp and which he drove on the journey. In leaving Redlands they proceeded in a westerly direction on a county highway of the county of San Bernardino which extended along a street known as Barton avenue. At some time between 11 o'clock and 11:30 o'clock of the same evening Schwanekamp and his companion approached a right of way of the Southern Pacific Company which intersected Barton avenue. This crossing is known as the Bryn Mawr crossing. The railroad right of way is 100 feet in width. At the point of intersection there are five tracks on the right of way, the main track of the Southern Pacific Company and four side tracks. Easterly from the right of way, Barton avenue, at the time of the accident, was paved approximately 40 feet in width to a point on the north side of said avenue, which was between 15 and 21 feet from the easternmost rail on the railroad crossing. The street was paved across the railroad right of way to a width of 28 feet. West of the right of way the street was 28 feet in width and was paved to a width of approximately 18 feet. During the month of January, 1926, the pavement on Barton avenue east of the railroad tracks had been extended on the north side for a distance of approximately 12 feet up to a point which was between 15 and 21 feet from the most easterly rail of the railroad tracks. The result of this widening process was to leave unpaved on the north side of the avenue east of the railroad crossing a strip approximately 12 feet in width and between 15 and 21 feet in length. After the pavement had been thus widened, no barrier or fence or sign was placed at the point by the county for the purpose of diverting travel from the unpaved portion of the street or to warn drivers on the highway that they were approaching a railroad crossing whereon the pavement was narrower than that of the highway. On the west side of the crossing at the south side of Barton avenue there was a railroad crossing sign maintained by the railway company, and on the north side of the

avenue west of the crossing there was a white fence. On the railroad crossing the rails of the tracks were flush with the pavement on that portion of the crossing which was paved. North of the paved portion the rails extended upward for a distance of about 5½ inches above the surface of the surrounding ground. Schwane-kamp was driving his automobile along the north side of the avenue as he approached the railroad crossing. When his automobile reached the crossing, one or more of the front wheels struck the first protruding rail which was encountered. This sudden contact caused both persons in the automobile to be thrown from it. Schwane-kamp was thereby injured so severely that he died two days later. The automobile continued on its course for some distance and was overturned and almost completely wrecked.

The contentions of the appellant county of San Bernardino on its appeal from the judgment may be summarized as follows: Respondent sought to impose liability upon appellant and its codefendant, the Southern Pacific Company, for the alleged wrongful death of his intestate on two grounds. These were that they were guilty of negligence, first, in failing to have paved the railroad crossing to the same width that the highway east of said crossing was paved, and, second, in failing to have erected a barrier or some obstruction, or a sign which would have conveyed warning to travelers on the highway that the railroad crossing was not paved to the same width as the highway and that, due to the narrower paving and exposed rails, they were approaching a place of danger. No liability could be imposed upon the county for failure to have more extensively paved the railroad crossing. The evidence produced during the trial showed that the Southern Pacific Company was the owner of the right of way and had exclusive control over it, and that the county had no authority to enter upon such right of way and to pave or otherwise to improve it. The liability of the appellant county must therefore rest upon the charge that it was negligent in having failed to erect a barrier or sign which would have conveyed warning to travelers on the highway that they were approaching a railroad crossing whereon the pavement was narrower than on the highway. The alleged negligence of appellant in the last-mentioned respect does not amount to a charge that the highway itself was defective in

any respect or that the extension of the pavement on the highway east of the railroad crossing created a condition that was inherently dangerous. The liability of appellant is based upon its alleged negligence in having failed to perform a duty which it owed to the traveling public. Appellant is not an insurer of the safety of the highways under its control. The primary question to be answered is whether it may be declared that a reasonably prudent person should have foreseen that the failure to warn by the erection of a sign or barrier would be reasonably certain to endanger the safety of persons rightfully using the highway. The conditions shown by the evidence to have existed at the time of the accident indicate that this question should have been answered in the negative. It was shown that the protruding rails on the unpaved portion of the railroad crossing were visible to drivers of motor vehicles approaching the crossing from the east for a distance of at least 2,000 feet during the daytime and for a distance of at least 200 feet at night if the automobiles of such drivers were equipped with efficient headlights properly illuminated. Even though the above-stated question should be answered in the affirmative, the burden rested upon respondent to show that appellant's negligence was the proximate cause of the death. This burden was not sustained. Contributory negligence of the deceased was pleaded and proved as a proximate cause of death and the property damage shown to have resulted from the accident. The evidence conclusively established that the place of danger was clearly visible to an automobile driver at night if his automobile was equipped with proper headlights properly illuminated. If it be assumed that respondent's intestate did not see the narrower pavement on the railroad crossing and the adjacent protruding rails of the railway tracks, he was himself chargeable with his failure in this regard, a failure which constituted negligence directly contributing to the happening of the accident that cost him his life. These contentions merit careful consideration.

It is conceded that liability is here sought to be imposed on appellant county of San Bernardino in accordance with the provisions of section 2 of Act 5619 of the General Laws of California (Stats. 1923, p. 675; Deering's Gen. Laws 1931, Act 5619). So far as is here relevant, this statute provides that "Counties, * * * shall be liable for injuries to persons and property

resulting from the dangerous or defective condition of public streets, highways * * * in all cases where the governing or managing board of such county * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1] It is evident from the above-quoted language that Act 5619 is a general act, defining the liability of a county and the other public bodies named therein to the general public and specifying the conditions under which said liability may attach. *Ahern v. Livermore Union High School District*, 208 Cal. 770, 782, 284 P. 1105. One of the important conditions precedent to the imposition of such liability is the requirement that the governing or managing board of the county shall have had knowledge of the defective or dangerous condition of the street or highway which is alleged to have been the proximate cause of the injuries sustained. The question of knowledge, which is often an important feature in actions based upon the above-mentioned statute, is not here present. It is conceded that appellant had notice of the condition which is alleged to have been a dangerous condition. Nor is it disputed that the highway whereon the deceased was traveling at the time he was fatally injured was a public highway under the control of appellant. The important primary question in the case is whether or not it was satisfactorily shown that there was in fact any defective or dangerous condition of the highway which appellant should have remedied. A consideration of this question in effect amounts to a consideration of appellant's contention that the trial court's finding that appellant was negligent is lacking in evidentiary support. A consideration of this contention requires a summary of the evidence which bears upon the question.

The only evidence presented to the trial court which showed the circumstances immediately preceding the happening of the accident consisted of the testimony of the

woman who was then riding in the automobile operated by the deceased as his guest. The testimony of this witness may be summarized as follows: The witness and deceased set out from Redlands on the return journey to Los Angeles between 10 o'clock and 10:30 o'clock in the evening in a Chevrolet coupé, which was the property of deceased, and was being then operated by him. As they proceeded in a general westerly direction along a highway which neither had ever before traversed, they approached the scene of the accident at approximately 11:30 p. m. The night was dark. The headlights of the automobile were burning and illuminated the roadway in front of the automobile for a distance of at least 200 feet. The automobile was proceeding along the north side of the street. For some distance prior to arriving at the scene of the accident the automobile was operated at a speed of approximately 30 miles per hour. When the vehicle arrived at the point where the paving on the north side of the highway terminated, the speed was decreased to about 25 miles per hour, and as it approached nearer to the railroad crossing, the driver applied the brakes with the result that the speed of the automobile was further decreased to about 15 miles per hour. The driver also caused the car to swerve slightly to his left. His efforts to prevent the wheels of the automobile from coming in contact with the projecting rails of the railroad were unsuccessful. At the time the wheels of the automobile struck the rails, both doors of the coupé flew open and both occupants of the machine were thrown from it. For a distance of approximately 150 feet east of the railroad crossing the highway made a slight ascent. The witness was awake and was looking ahead in the direction in which the automobile was proceeding. When the car arrived at a point about 15 feet east of the place where the pavement on the north side of the highway came to an end, she observed that they were approaching the end of the pavement. She had theretofore observed a railroad crossing sign which was on the south side of the highway and west of the railroad crossing, and a white fence which was on the north side of the highway and likewise west of the railroad crossing, and was aware that the machine was approaching a railroad crossing. She did not, however, then observe the projecting rails of the railroad and did not see such rails until the coupé was very near the easternmost rail and "almost ready to hit" this rail.

It is obvious that the basis for respondent's claim that the fatal accident was caused by the negligence of appellant rests upon the contention that the failure of appellant to have erected a barrier or other obstruction or a warning sign at or near the point where the pavement terminated on the north side of Barton avenue created a dangerous condition. Appellant maintains that no duty rested upon it to erect such obstruction or sign unless it can be declared that appellant should have foreseen that automobile drivers using ordinary care for their own safety would not perceive the projecting rails in ample time to avoid striking them. This suggestion is so closely interwoven with the contention that the evidence showed that the deceased was guilty of contributory negligence that it will be considered along with the contributory negligence contention. With respect to the general charge that the evidence failed to show that appellant was guilty of negligence in having failed, with knowledge of the situation, to erect a barrier or sign, it must be conceded that this question was one of pure fact to be determined by the trial court. We are not constrained to disturb the finding of negligence upon the facts disclosed by the record.

[2,3] In support of the contention that the finding negating contributory negligence by the deceased is not supported by the evidence, it is declared that there was uncontradicted evidence which showed that the rails were clearly visible at night for a distance of 200 feet east of the railroad crossing, and it is therefore argued that the testimony of the above-mentioned witness to the effect that she did not see the rails until the automobile in which she was traveling was "almost ready to hit" the easternmost rail necessarily gave rise to the inference that she was not giving proper attention to what was ahead. In other words, the effort is made to apply the principle that one is under the duty of seeing that which is visible. The chief difficulty which arises in attempting to apply the principle is that it must be applied, not to the witness, but to the driver of the automobile to recover damages for whose death this action was instituted. If it be conceded that the principle is applicable to the passenger, a concession that is dependent on the inference that she must have seen what was visible, it does not follow therefrom that it must be declared that the driver must have seen the projecting rails because they were generally visible at

night for a distance of 200 feet east of the railroad crossing. We may not overlook the general presumption that one who is operating an automobile on a highway will employ ordinary care for his own safety. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083. Furthermore, there was no showing that the conditions which existed at the time when other witnesses testified they could see the rails for a distance of 200 or more feet east of the railroad crossing in the nighttime were the same as the conditions which prevailed at the time of the accident which formed the basis of this action. We think, therefore, that it did not sufficiently appear that the projecting rails were necessarily always visible in the nighttime for a distance of at least 200 feet, so that we must declare that the trial court committed reversible error in failing so to find and in further failing to find that the deceased was himself guilty of negligence in not having seen that which was visible. *Bennett v. Kings County*, 124 Cal. App. 147, 12 P.(2d) 47.

The negligence of the county for which recovery was here permitted was, as heretofore mentioned, the failure so to have obstructed the highway by means of a fence or guard rail or in some other manner to have conveyed information to the drivers of automobiles that a railroad crossing was in close proximity and that the pavement over such crossing was narrower than the highway up to the point where the paving on the north side of such highway ended. It is undenied that the deceased operated his automobile on his right-hand side of the highway as he approached the railroad crossing. There was evidence that he was driving at a moderate rate of speed as he proceeded up the slight grade which brought him nearer to the crossing and that he decreased this rate of speed twice, the second diminution occurring when he applied his brakes at about the time he arrived at the unpaved portion of the highway and amounting to a reduction of approximately half the speed at which he was then operating the automobile. The evidence also indicates that he attempted to swerve the automobile to the left for the purpose of avoiding the projecting rails, that he was unsuccessful in so doing, and that the right front wheel of the coupé came in contact with the easternmost rail, which projected some 5½ to 7 inches above the

surface of the ground at that point. The evidence also showed that the sudden striking of the right front wheel of the automobile with the projecting rail caused both doors of the automobile to fly open and the deceased to be thrown from the coupé, thereby suffering injuries which later caused his death. The questions of the alleged negligence of the county of San Bernardino in the above-mentioned regard and the alleged contributory negligence of the deceased were questions which were to be answered by the trial court from the facts and circumstances disclosed by the evidence presented to it. The court, unaided by a jury, has performed this duty and has answered the questions adversely to the appellant county, and we do not find ourselves impelled to declare that it has arrived at an erroneous conclusion from the record here presented.

The appellant county points to the fact that the evidence presented during the trial showed that no other accident of the character which caused the injuries here complained of had occurred at the Bryn Mawr crossing for a period of two years. From this it is argued that the trial court evidently accepted the evidence of the accident which resulted in Schwanekamp's death as proof of the fact that the failure to obstruct the highway or to post a warning sign constituted negligence. In thus attacking the finding of negligence, it is confidently asserted that the mere fact that an accident occurred was not sufficient alone to raise a presumption of negligence.

[4,5] With respect to this particular contention, it may be conceded that proof of the occurrence of the accident might not, standing alone, suffice to raise a presumption of negligence. It was, however, some evidence which tended to show that a dangerous condition with respect to the highway existed at Bryn Mawr crossing. *Hook v. City of Sacramento*, 118 Cal. App. 547, 552, 5 P.(2d) 643. Appellant's evidence that no similar accident had occurred for a number of years prior thereto was addressed to the proposition that the place was not dangerous. It is apparent that upon this point, therefore, the evidence was conflicting, and that the trial court resolved the conflict in respondent's favor. No citation of authorities is required to support the familiar rule of appellate procedure that a finding of fact which is based on conflicting evidence may not be disturbed by a reviewing court. Furthermore, it must be observed that the

mere fact of injury was not the only evidence before the trial court which tended to show that a dangerous condition existed at the crossing. The court also had the testimony of the deceased man's companion at the time the accident occurred, which portrayed the circumstances immediately surrounding the occurrence of the accident.

[6] There is some suggestion that because of the fact the respondent originally joined certain officers of San Bernardino county as defendants in the action and judgment was rendered in favor of these officers upon the sustaining of a general demurrer in their behalf to the complaint, which judgment was affirmed on appeal, therefore the judgment against appellant may not here be affirmed, since the county's agents who were responsible for the condition of county highways have been thus absolved of liability. This argument is based on the familiar doctrine of agency that, in order to hold the principal liable for the agent's tort, the liability of the agent must first be established.

The record shows that when this action was first instituted, James W. Cole, the highway commissioner of San Bernardino county, and Charles Long, a district highway commissioner, were joined as defendants therein, and that recovery of damages was sought against them jointly with their codefendants, the appellant county and the Southern Pacific Company. The above-named officers of appellant and appellant demurred to the complaint. The demurrer was sustained with leave granted to respondent to amend the complaint. Thereafter, on application of respondent, the order sustaining the demurrer of the officers of the county and granting leave to amend was so modified that leave to amend was eliminated from the order. Thereupon judgment dismissing the action as to the officers of the county was duly entered. At a somewhat later date, respondent having failed to amend his complaint, so far as the appellant county was concerned, within the time specified in the court's order sustaining the demurrer, judgment of dismissal was entered in favor of appellant. From both of the above-mentioned judgments respondent herein, William F. Adams, appealed. On this appeal the judgment dismissing the action as to the officers of appellant was affirmed on the ground that Adams, having requested that the demurrer of the county officers be sustained without leave to amend, necessarily consented to the rendition of the judgment in

their favor and could not therefore object to the judgment by appealing from it. The judgment dismissing the action as to the county of San Bernardino was, however, reversed on the ground that the complaint stated a cause of action against the county. *Adams v. Southern Pacific Co.*, 109 Cal. App. 728, 293 P. 681.

We think that it may not now be successfully urged that because the respondent consented to the entry of a judgment in favor of the county officers on the sustaining of a general demurrer to his complaint he thereby lost his right to seek a recovery against the county. It is obvious that, so far as the county is concerned, his cause of action is based on the provisions of section 2 of the above-mentioned Act 5619. The allegations of the complaint show that such was the case, and the record indicates that the suit was tried on the theory that the county's liability could only be maintained by virtue of this particular statute. This section of the act does not purport to give a right of action against any officer of a county. Its scope is limited specifically to conferring a right of action against certain designated public corporations for specific acts of negligence relating to a dangerous or defective condition of public streets, highways, buildings, grounds, works, and property. The scope of the section is further restricted by the limitation that knowledge or notice of the defective or dangerous condition shall be a prerequisite to the imposition of liability. As was said by Mr. Justice Langdon in *Watson v. City of Alameda*, 219 Cal. 331, at page 333, 26 P. (2d) 286, 287: "The municipality is not, under this statute, liable in the same manner as a private corporation, for negligence of its employees; nor is it enough to show a dangerous condition of property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery." It may further be observed that the liability of public officers, as distinguished from public corporations, for injuries resulting from the defective or dangerous condition of a public street or highway and the conditions under which such liability may be imposed are declared

by another statute, to wit, the Act of May 18, 1919 (Stats. 1919, p. 756; Deering's Gen. Laws, 1931, Act 5618). See *Shannon v. Fleishhacker*, 116 Cal. App. 258, 261, 2 P. (2d) 835.

The appeal of the plaintiff herein is from that portion of the judgment which permitted recovery for the death of plaintiff's intestate in the amount of \$1,500. The ground of this appeal is that the amount so specified is inadequate and insufficient. In support thereof, it is contended that the trial court should have allowed an additional amount of \$1,164.02 for the funeral and burial expenses of the deceased, which were shown to have been incurred and paid. The sole problem presented on this appeal is therefore whether, under the facts and circumstances of this case, recovery may be properly allowed for funeral and burial expenses which the trial court found were reasonable and proper, and which were shown to have been incurred and paid.

[7] In entering upon a consideration of this problem, it should be observed that certain established legal principles are pertinent. In the first place, it must be borne in mind that we are here dealing with a tort action. The plaintiff has undertaken to show that he has been injured through the wrongful act of another. The measure of damages which is declared in section 3333 of the Civil Code is therefore applicable. This statute provides that the injured party is entitled to be compensated for all the detriment proximately caused by the wrongful act, whether such detriment could have been anticipated or not. In the second place, it must be conceded that we are here dealing with a peculiar kind of tort action. The plaintiff is the administrator of the estate of a deceased person, and this action has been brought to recover damages for the death of the deceased, which is alleged to have been caused by the negligence of the defendant. The action, therefore, is controlled by the provisions of section 377 of the Code of Civil Procedure. This statute not only confers a right of action for wrongful death, but provides the measure of damages. It is there declared that in an action for wrongful death "such damages may be given as under all the circumstances of the case, may be just." The breadth of the language employed would appear to provide a wide latitude in the admeasurement of damages. Due to this fact, it has been held that the statute should

receive a broad construction. *Bond v. United Railroads*, 159 Cal. 270, 277, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; *Brown v. Beck*, 63 Cal. App. 686, 697, 220 P. 14. However, it has also been declared and must be regarded as settled that the damages which are recoverable in an action of this character for the death of the victim are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given. *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 516, 30 P. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; *Sneed v. Marysville Gas, etc., Co.*, 149 Cal. 704, 710, 87 P. 376; *Johnson v. Southern Pacific R. R. Co.*, 154 Cal. 285, 298, 97 P. 520; *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 716, 106 P. 83; *Bond v. United Railroads*, supra; *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908; *Parsons v. Easton*, 184 Cal. 764, 195 P. 419; *Cossi v. Southern Pacific Co.*, 110 Cal. App. 110, 293 P. 663.

[8-12] In giving consideration, therefore, to the contention of the appellant on this appeal, that the trial court erred to his prejudice in refusing to include in the judgment the amount which it had found was a reasonable and proper amount expended for the funeral and burial of the victim, the important question which is presented is whether or not it may properly be declared that the money thus expended constituted an item of pecuniary loss to the person for whose benefit the action was instituted. Fortunately, there is no dispute as to the factual background upon which this question is presented.

The record shows that the father of the deceased is his sole heir. It also appears that a special administrator of the estate of the son was appointed in the state of Wisconsin. It further appears that the son had a policy of insurance on his own life, which was payable to his estate, and that after his death the Wisconsin administrator collected the amount due on the life insurance policy and from the proceeds paid the funeral and burial expenses, including the expenses incident to removing the body of the deceased from California to Wisconsin for burial.

From these facts it is difficult to understand how it may be successfully contended that the funeral and burial expenses of the deceased constituted a pecuniary loss suffered by the father which could properly be included as an item of damage recover-

able in this action. For the purposes of this opinion, it will be assumed that, generally speaking, funeral expenses are recoverable in actions of this character, and that this is the rule in California. It does not, however, follow therefrom that such expenses are always so recoverable. The established rule limiting recovery in death cases to the pecuniary loss sustained by the beneficiary of the statute must be borne in mind, and the circumstances of the particular case must be measured by this rule.

Since it is not disputed that the funeral and burial expenses of the deceased were paid from the proceeds of a life insurance policy which was payable to his estate, we think that it may not be urged that these expenses constituted a pecuniary loss to the father, his sole heir, which occurred by reason of the son's death. Actually, it is obvious that in the payment of such expenses the father suffered no pecuniary loss whatever, since they were paid, not by the father, but by the administrator of the son's estate from money belonging to the estate which came into his hands as administrator. That such expenses constituted a proper charge against the estate for which the estate was primarily liable is not open to doubt. Probate Code, § 950. Appellant argues that the payment of such expenses constituted a pecuniary loss to the father because thereby the amount which he is entitled to receive as sole heir of the deceased is reduced. This may be conceded. Nevertheless, the fact remains that the father did not himself pay these expenses, and it may not therefore be declared that in their payment the father suffered a pecuniary loss. Conceivably, the expenses of administration of the son's estate will further reduce the amount which the father will receive as sole heir of the son, but we cannot imagine and it is not contended that such expenses, constituting a proper charge against the estate, are recoverable as an item of damage in this action.

In giving consideration to the claim that the funeral expenses should have been included as an item of damage, it should further be borne in mind that the heir of a deceased for whose death an action of this character is maintained does not take the money awarded by succession as an heir. He is entitled to take the money as the beneficiary of a statute which expressly confers upon him a right of action. *Burk v. Arcata, etc., R. R. Co.*, 125 Cal.

364, 368, 57 P. 1065, 73 Am. St. Rep. 52. The amount recovered in such an action constitutes no part of the estate of the deceased, and where the action is brought, as is the case here, by the personal representative of the deceased, such personal representative acts solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had. Ruiz v. Santa Barbara, etc., Co., 164 Cal. 188, 191, 128 P. 330; Estate of Ricconi, 185 Cal. 458, 461, 197 P. 97, 14 A. L. R. 509. When, therefore, it appears, as it does here, that funeral and burial expenses of a deceased, whose death has been caused by the wrongful act or neglect of another, have been paid from money belonging to the decedent's estate, the heir who is given a statutory right of action to recover damages for the death has manifestly suffered no pecuniary loss because of the payment of such expenses. In such a case, the heir occupies a dual position. He is entitled by succession to take whatever balance remains in the estate after proper claims for which the estate is liable have been paid, and he is entitled as the designated beneficiary of the statute to recover the exact amount of actual pecuniary loss which he is able to show he has suffered by reason of the death. He is clearly not entitled to increase the amount of damages by including therein money which he did not himself pay, but which was rightfully and properly paid from the funds of the estate. We can see no difference in principle from the situation which is here presented and that which would have been presented if the deceased, prior to his death, had deposited with an undertaker an amount of money ample to pay all expenses that were here incurred with the instruction that the undertaker should, in the event of his death, provide the articles and services required for his funeral and for his burial, including the expense of transporting his body to his native state, and pay such expenses out of the fund thus deposited. In effect, the deceased accomplished this result by insuring his life in an amount more than sufficient to pay funeral and burial expenses, and by directing that the beneficiary of the policy should be his estate.

For the reasons stated, the judgment from which these appeals have been taken is in all respects affirmed.

We concur: BARNARD, P. J.; MARKS, J.

7 Cal.App.2d 109

DENSMORE v. CHAINEY et al.

Civ. 8658.

District Court of Appeal, Second District,
Division 1, California.

May 22, 1935.

Mines and minerals §79(1)

Where, in consideration of conditional vendor's consent to oil lease, conditional purchasers agreed that conditional vendor should have two-fifths of royalty specified in original lease for term thereof, and later agreed with sublessee and lessor, both of whom knew of conditional vendor's rights, for drilling of another well for lesser royalty, conditional vendor held entitled to royalty specified in original lease in respect of oil produced from second well.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Margaret Densmore against George Chainey and others. From a judgment for named defendant, plaintiff appeals.

Reversed and remanded, with directions.

Claud B. Andrews and Rodney F. Williams, both of Los Angeles, for appellant.

John C. Gillham, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Appellant Margaret Densmore and her husband, Darlot Densmore, during his lifetime on March 29, 1921, entered into an agreement with George and Kate Chainey to sell certain real property, reserving title in themselves until the amount required had been paid and the other terms of the agreement complied with, pursuant to which the Chainey's entered into possession of the property. (Unless otherwise stated, the term appellant when hereafter used is intended to include both Densmores.)

On July 13, 1921, the Chainey's as lessors entered into an oil and gas lease, hereinafter referred to as original lease, with Oceanic Oil Company, as lessee, for a term of twenty years, lessee therein to have the right to continue to operate and produce as long thereafter as it could be done in paying quantities. On June 23, 1921, appellant consented in writing to the execution of said lease, but two days prior thereto appellant and the Chainey's

had entered into a written agreement referred to hereinafter as sales agreement. In the sales agreement the Chainey's are the first parties and the Densmore's are the second parties. It is recited that the Densmore's are the owners of the property which is then described, and which is the same property demised in the original lease, and thereafter said sales agreement reads as follows:

"Whereas, by a certain contract of sale dated March 29th, 1921, the second parties agreed to sell and the first parties agreed to buy the said property; and

"Whereas, the first parties did on the 13th day of June, 1921, enter into a certain Oil and Gas Lease with the Oceanic Oil Company, providing for the exploration and exploitation of said property; and

"Whereas, it is the desire of the parties hereto to divide between them the royalty that may be received under said lease.

"Now, Therefore, in consideration of the mutual concessions of the parties hereto and the execution of the said lease by each of the parties, it is agreed as follows:

"1. That the one-sixth ($\frac{1}{6}$) royalty shall be divided equally between the first and second parties, until the second parties shall have received the full amount due them under the said contract of sale, together with accrued interest.

"2. After the second parties have received the full amount called for above then the royalty shall be divided three-fifths ($\frac{3}{5}$ ths) to the first parties and two-fifths ($\frac{2}{5}$ ths) to second parties.

"3. Nothing herein shall relieve the first parties from strict compliance with the contract of purchase or its making of the payments therein called for, excepting that they shall be credited on said contract with all money received by second parties as provided for in paragraph 1.

"4. A copy of this Contract shall be filed with the Oceanic Oil Company and they are hereby instructed to pay the royalty as herein provided.

"Executed in Triplicate the day and year first written.

"[Signed] George Chainey

"[Signed] Kate Gray Chainey,
First Party

"[Signed] Darlot Densmore

"[Signed] Margaret Densmore,
Second Party."

On or about January 16, 1923, before any oil was produced from the property, the Chainey's completed their conditional purchase agreement with appellant and received a grant deed to the property free from any reservations. Prior to the commencement of drilling operations, respondent Thomas Kelly & Sons, Inc., became sublessee of Oceanic Oil Company on the property here involved. It is admitted that respondent had actual notice of the sales agreement, and it is also admitted that appellant Margaret Densmore has properly succeeded to the interest of her deceased husband who died in December, 1926.

The original lease with reference to the payment of royalty provided: "The Lessee shall pay the Lessors, as royalty and rent for said premises, the one-sixth part of all oil, gas, asphaltum, or other hydrocarbon substances extracted and saved from said premises." During the first part of the year 1928, respondent proposed to its sublessor Oceanic Oil Company, the Chainey's and appellant Margaret Densmore that it would sink a well, to be known as Kelly's Well No. 2, at a cost of approximately \$100,000, on the condition that the Oceanic Oil Company would reduce the overriding royalty called for in the sublease from $18\frac{1}{2}$ per cent. to 10 per cent., and that the Chainey's and appellant Margaret Densmore would reduce the landowners' royalty called for in the original lease from 16% per cent. to 10 per cent.; such reduction to be effective only as to the production of the proposed Kelly Well No. 2. The consents of Oceanic Oil Company and the Chainey's were obtained, but appellant Margaret Densmore steadfastly refused such consent, and did not give it. Respondent, nevertheless, proceeded to drill Kelly Well No. 2, and completed the same at a cost in excess of \$100,000, placed the same on production, and paid the royalties called for in accordance with the consents which had been previously obtained. Appellant Margaret Densmore received $\frac{2}{5}$ of the 10 per cent. paid as landowners' royalty on Kelly Well No. 2, and alleges that the difference between $\frac{2}{5}$ of the 10 per cent. actually received to and including March 20, 1932, and $\frac{2}{5}$ of 16% per cent. called for by the original lease is \$5,089.30, no part of which has been paid, and prays for judgment in that amount. Appellant's prayer was refused, judgment given for respondent, and from that judgment she appeals.

Prior to the commencement of the present action, the Chainey's filed an action on August 17, 1928, which eventually reached this court (*Chainey v. Shostrom*, 119 Cal. App. 237, 6 P.(2d) 353), the purpose of which action was to have the sales agreement canceled and for an accounting, on the theory that the agreement to divide the royalty or rent to be received under the original lease amounted to a reservation or interest in the land, and, not being reserved in the deed, was waived. The court in that case summarized the facts, and in 119 Cal. App. 237, on page 239, 6 P.(2d) 353, 354, says: "In closing the transaction, a deed was executed by the Densmores and deposited with an escrow holder to be delivered to plaintiffs upon payment of the balance due. A clause included in the signed escrow agreement read as follows: 'It is understood by the parties hereto that the royalties on the oil lease on this property is for $\frac{1}{2}$ of production and that the same is to be distributed $\frac{3}{4}$ ths to purchaser and $\frac{1}{4}$ to seller for life of lease.' The deed executed by the Densmores and delivered to plaintiffs pursuant to the escrow instructions was in the ordinary form of a grant deed, and made no mention of the royalty. Thereafter oil was produced and the royalty, received each year under the lease, and divided by plaintiffs and the Densmores under the terms of their contract, ran into large sums of money. Apparently no dispute arose until the plaintiffs sought to obtain the consent of defendant Margaret Densmore to a modification of the terms of the lease with the lessee. Upon her refusal to consent thereto, plaintiffs brought this action. Contrary to the contentions of plaintiffs, the trial court by its judgment declared, in effect, that the contract relating to the division of the royalty was a valid and existing contract; that defendant Margaret Densmore was entitled to $\frac{1}{2}$ of the royalty received and to be received under the terms of said lease; and that plaintiffs were not entitled to recover from said defendant any of the money theretofore paid under the terms of said contract. * * *

With reference to the contention of the Chainey's in said action, the court said: "We deem it unnecessary to enter into discussion of whether the contract created 'an interest in the land' as contended by appellants, as we do not believe that the rights of the Densmores under the contract would be affected by a determination

of that question. Both the terms of the contract and the terms of the escrow agreement under which the deed was delivered showed that it was at all times the intention of the parties that the Densmores' right to share in the royalty should continue for the life of the lease, and after the payment of the purchase price and the transfer of title to appellants. Under these circumstances, the deed transferring title to appellants cannot be relied upon as a waiver of the rights of the Densmores under the contract. We are of the opinion that the trial court properly decreed that the grant deed did not impair or in any manner affect the right of the Densmores to continue to receive their agreed share of the royalty."

It seems clear to us that by the sales agreement the Chainey's, in consideration of the consent of the appellant given to the execution of the original lease, sold to appellant an equal portion of the royalty upon certain conditions and thereafter a $\frac{1}{2}$ portion of the royalty reserved in the original lease for the term thereof; that this sale was brought home to the Oceanic Oil Company is not disputed, and it is stipulated that the respondent Thomas Kelly & Sons, Inc., also knew the facts. Under such circumstances, the language of the court in the case of *Beam v. Dugan*, 132 Cal. App. 546, 553, 23 P.(2d) 58, 60, where an analogous situation is considered, is appropriate and applicable: "With these conflicting views of the character of the deposits in place there is, however, an unanimity of opinion that a reservation or sale by the landowner of an interest in the royalty or the rentals to be obtained from the land creates in the purchaser a right incident to the land itself which cannot be defeated by the act of the landowner without the consent of the purchaser. Whether we adopt the rule that the conveyances, which are the subject of this litigation, gave to the purchasers an interest in the oil and gas in place, an interest running with the land, or an interest in all royalties paid for a period of twenty years from the date of the outstanding lease, under the rule of *Jones v. Pier*, supra [124 Cal. App. 444, 12 P.(2d) 646], it is manifest that the purchasers secured from the landowners such an interest in the royalties paid under the second lease as would entitle them to an accounting and an adjustment of their rights." *Western Oil, etc., Co. v. Venago Oil Corp.*, 218 Cal. 733, 24 P.(2d) 971, 88

A. L. R. 1271; Jones v. Pier, 124 Cal. App. 444, 12 P.(2d) 646; Callahan v. Martin (Cal. Sup.) 43 P.(2d) 788.

So, in this case, it is manifest that appellant as purchaser secured from the Chainey's, the lessors in the original lease, who after they had obtained the consent of the appellant, were for all practical and legal purposes in the position of land-owners so far as the original lease was concerned, "such an interest in the royalties" to be paid under the original lease as would entitle appellant to an accounting from any one who ignored appellant's rights.

The judgment is reversed. Since all the facts of the instant case are stipulated, the trial court is directed to enter judgment for appellant in the amount prayed for.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 100

SCHULTZ v. SUSSMAN.

Civ. 9444.

District Court of Appeal, First District,
District 1, California.

May 22, 1935.

Hearing Denied by Supreme Court
July 17, 1935.

1. Appeal and error ⇨934(1)

Statement of trial judge in denying motion for judgment, notwithstanding verdict that if case had been tried by court it was altogether probable, if not certain, that finding would have been for defendant, *held* not to show that judge was clearly satisfied that verdict was wrong, so as to make denial of motion an abuse of discretion.

2. Appeal and error ⇨979(2)

Trial court's granting or refusing of new trial is conclusive and will not be disturbed in absence of clear and affirmative showing of gross, manifest, or unmistakable abuse of discretion, especially where ground of motion is insufficiency of evidence to justify verdict or decision, and there is substantial conflict in evidence.

3. Evidence ⇨598(1)

Number of witnesses testifying for either party is not the factor which determines weight to be given evidence.

4. New trial ⇨70

In action for damages for malicious assault, evidence *held* insufficient to show abuse of discretion by trial judge in denying motion for new trial.

5. Witnesses ⇨275(6)

In action for damages for malicious assault, refusal to permit defendant to cross-examine plaintiff regarding similar action for damages for injuries sustained over two years after receipt of those involved in present suit *held* not error.

6. Appeal and error ⇨207

Appellant, by failing to object to remarks of respondent's counsel in closing argument to jury, or to ask court to instruct jury to disregard them, waived objection.

Appeal from Superior Court, City and County of San Francisco; Geo H. Cabaniss, Judge.

Action by Adolph Schultz against C. Sussman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

PER CURIAM.

This appeal is from a judgment entered on a verdict in favor of plaintiff in an action for damages for an alleged malicious assault by defendant upon plaintiff. The verdict and judgment was for the sum of \$11,000. Defendant moved for a new trial, which was denied on condition that plaintiff deduct from the verdict \$6,000. Plaintiff filed his consent to such reduction.

Appellant contends that the court erred in denying his motion for a new trial, and also that the court erred in refusing to permit defendant to cross-examine plaintiff regarding other damage suits plaintiff might have pending against other persons for damages of a similar character.

[1] In support of his motion for a new trial, appellant has brought up a bill of exceptions on said motion, in which it is alleged that in denying his motion for a judgment, notwithstanding the verdict, the court used the following language: "If this case had been tried by the Court without a jury, it is altogether probable, if not certain, that

the finding from the facts in evidence would have been in favor of the defendant." In *Green v. Soule*, 145 Cal. 96, 103, 78 P. 337, 340, cited by appellant, the court said: "Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might, upon the evidence, have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand." It does not appear from the language used by the trial judge that he was clearly satisfied that the verdict was wrong.

[2] It is the settled law that the granting or refusing of a new trial is conclusive and will not be disturbed in the absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion, especially where the ground of the motion is insufficiency of the evidence to justify the verdict or decision, and there is a substantial conflict in the evidence. The granting or refusing of a new trial rests very largely within the discretion of the trial court; such discretion is very wide, and every presumption is indulged in support of the action of the court in passing upon the motion. 20 Cal. Jur. 27, and authorities cited.

[3, 4] The evidence in this case was conflicting. It is true that the only testimony of the assault was that of the respondent, while upon the part of the appellant there was the testimony of two witnesses, in addition to his own, that there was no assault. It is a well-settled principle that it is not the number of witnesses testifying for either party which produces conviction in the unprejudiced minds of the jurors. *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 255, 256, 278 P. 476, 279 P. 178.

We cannot say that there has been a showing of such gross abuse of discretion upon the part of the trial judge as would

warrant this court in holding that the denial of the motion for a new trial would justify a reversal.

[5] The appellant next contends that the court erred in refusing to permit cross-examination of plaintiff regarding other damage suits of a similar character which plaintiff might have pending. This testimony might have been pertinent if the cross-examination had reference to injuries of a similar nature occurring just before or immediately after the date of the injury set forth in this action, namely, November 19, 1929. It appears from the bill of exceptions that defendant sought to question respondent regarding an action for damages for injuries sustained on December 25, 1931. We see no error in this refusal of the court.

[6] Lastly, appellant contends that the court erred in refusing to grant a new trial by reason of the misconduct of plaintiff's counsel in his closing argument to the jury. The appellant made no objection to the remarks of respondent's counsel, nor asked that the court instruct the jury to disregard them. It is the uniform rule that the failure of counsel to assign as misconduct an improper statement made to the jury by his adversary is deemed a waiver and forecloses the question on appeal. *Murphy v. Zwieg*, 100 Cal. App. 266, 269, 279 P. 1062; *Bartolini v. Andrioli*, 123 Cal. App. 350, 352, 11 P.(2d) 66; *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 25, 186 P. 778; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368, 184 P. 672, 12 A. L. R. 1007. However, admitting that the remarks of respondent's counsel were improper, and that upon objection thereto the court would have instructed the jury to disregard them, it cannot be said that they were so unwarranted as to constitute ground for reversal.

The motion for a new trial was properly denied.

The judgment is affirmed.

HIATT v. BROCKMAN et al.

HIATT et al. v. SAME.

HIATT v. SAME.

Civ. 8644-8646.

District Court of Appeal, Second District,
Division 1, California.

May 21, 1935.

Rehearing Denied June 17, 1935.

1. Automobiles ⇨244(11, 35)

Evidence in actions for deaths and injuries in collision between automobile and truck driven by defendant that latter failed to make "boulevard stop" and crossed street intersection at not less than twenty miles per hour held sufficient to sustain verdict for plaintiff.

2. Appeal and error ⇨216(2)

Absence from correct instruction of further statement on another question connected with subject-matter held not available error, in absence of showing that appellants asked additional instruction.

Appeal from Superior Court, Los Angeles County; J. P. Sproul, Judge.

Two actions by Harry C. Hiatt and action by him and another against Henry E. Brockman and others. Judgments for plaintiffs, and defendants appeal.

Affirmed.

Elliott & Aberle and Robt. E. Moore, Jr., all of Los Angeles, for appellants.

T. L. Foley and Dryer, Castle & Richards, all of Los Angeles, for respondents.

CONREY, Presiding Justice.

In No. 8644, the plaintiff sued to recover damages for the death of his minor son Jackie Verne Hiatt, resulting from a collision between an automobile operated by the plaintiff and a truck and trailer operated by the defendant Henry E. Brockman; it being alleged that said collision and said death of said plaintiff's son were caused by negligence of the defendant Henry E. Brockman in his operation of said truck and trailer. In No. 8645 it was alleged that Dorothy Lillian Hiatt, wife of the plaintiff Harry C. Hiatt and daughter of the plaintiff Anna M. Headrick, was killed as a direct and proximate result of the negligence of said Brockman as above stated. In No. 8646 the plaintiff Harry C. Hiatt sued for personal injuries received by himself in the same accident above mentioned. The defendants Patritti and Patritti Bros.

are sued as owners of said truck and trailer and employers of Brockman. In each action, judgment was entered against the defendants, and they appeal therefrom.

The accident occurred thirty minutes after midnight, at the intersection of Western avenue and 190th street. Plaintiff, in a Ford car, was going north on Western avenue. Brockman, in his truck was going west on 190th street. There was a "boulevard stop" sign, which required a stop to be made before attempting to cross Western avenue at that intersection. One of the alleged negligent acts of Brockman was that he failed to stop, and that he carelessly proceeded across, all without due regard for the safety of others.

[1] It is contended by appellants that the evidence is "insufficient to show" negligence on the part of appellants. There is evidence, substantially tending to prove that Brockman was crossing the intersection at an excessive speed, and without having made the boulevard stop. His own testimony is that he did stop, and that his speed was only twelve miles per hour. But there is other evidence showing that when questioned soon after the accident, he carefully limited his replies to a statement that he "slowed down." And as to speed within the intersection, the plaintiff testified that the truck was moving at not less than twenty miles per hour.

Appellants contend that the evidence "clearly shows" that the plaintiff was guilty of negligence which contributed proximately to the collision. But while some of the evidence tends toward support of this argument, there is substantial evidence to the contrary. Both on the question of negligence of the defendants, and on the issue of contributory negligence, notwithstanding some evidence in favor of the defendants, the verdict is based upon evidence amply sufficient to sustain the jury's decision.

[2] Appellants' third point is that the court erred in one of its instructions, because the instruction, although it correctly stated the law, did not contain a further statement on another question connected with the subject-matter of the given instruction. But appellants do not show or claim that they asked for such additional instruction. The point is without merit. *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 44, 297 P. 884, citing *Townsend v. Butterfield*, 168 Cal. 564, 569, 143 P. 760.

Our decision on the foregoing points of the appeal is a complete answer to appellants' further contention that the court erred in denying their motion for a new trial.

The judgments are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.



6 Cal.App.2d 696

MOORE v. TEEL

Civ. 8617.

District Court of Appeal, Second District,
Division 1, California.

May 13, 1935.

1. Limitation of actions $\S$ 21(3)

Action for services completed more than two years before commencement of action held barred by two-year statute, where there was no written contract (Code Civ. Proc. $\S$ 339).

2. Work and labor $\S$ 28(4)

In action for reasonable value of services in managing defendant's building, plaintiff's testimony that he rendered bill for entire time and that he thought that he was entitled to have his bill paid in full at rate of \$100 per month held not evidence of reasonable value and did not support finding as to value.

3. Account, action on $\S$ 22

Evidence held to support finding that cross-defendant became indebted to cross-complainant on open book account for physician's services for only \$1,873, though cross-complainant claimed that book account proved entitled him to full sum of \$4,124, in view of testimony indicating some irregularities and alterations in entries on cards and books produced as constituting the open book account, which presumably were considered by court in settling the amount to be allowed.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Clem Moore against A. W. Teel, in which defendant filed a cross-complaint. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Appeal from the order dismissed. Judgment reversed, and cause remanded for a new trial.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for appellant.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for respondent.

CONREY, Presiding Justice.

This action was commenced by complaint filed April 1, 1930. The complaint contains six counts, each separate from the others both in time and in substance of the transactions involved. There is a seventh count which, as the trial court found, is merely a summation of the previous causes of action on which the total demand was for a judgment of about \$8,000.

There is also a cross-complaint whereby the defendant, who is a physician, sought to recover the sum of \$4,124 as the reasonable value of professional services rendered to the plaintiff and the plaintiff's family. In count 2 of the cross-complaint the same demand was set forth as upon an open book account.

The court by its findings and decision allowed to the plaintiff on count 1, \$100; on count 2, nothing; on count 3, \$160; on count 4, \$50; on count 5, \$1,600; on count 6, \$2,278.35; making a total of \$4,188.35. On the cross-complaint the court found that the defendant was not entitled to recover anything on the first cause of action; but for the same services, as alleged in the second count of the cross-complaint, found the plaintiff indebted to the defendant upon the open book account in the sum of \$1,873. The court then struck a balance between the foregoing items, and gave judgment in favor of the plaintiff in the sum of \$2,315.35. From this judgment the defendant appeals.

[1] The causes of action stated in plaintiff's counts 1, 4, and 6 are barred by the provisions of section 339 of the Code of Civil Procedure, and the defendant's plea to that effect should have been sustained. There was no written contract between the parties. The work referred to in each of those counts was completed more than two years before the commencement of the action, according to the plaintiff's own testimony.

[2] Count 3 of the complaint is for services rendered in collecting the rents of cer-

tain oil and gas stations. The evidence appears to sustain the finding that these services rendered were of the reasonable value of \$160. Count 5 states a cause of action for services "in managing the Teel Bungalow Court in Glendale, California, owned by the defendant," which services were alleged to be of the reasonable value of \$4,550. The court found that these services were of the reasonable value of \$1,660. This finding is not sustained by the evidence. Apparently there was no evidence of the reasonable value of these services. To meet appellant's contention on this point, respondent's reply points only to his testimony wherein he said: "I put in my bill there for the entire time. And I think that I am entitled according to that to have my bill paid in full, \$100.00 a month for the entire time." This was not evidence of the reasonable value of the services rendered.

[3] On the cross-complaint appellant claims that the evidence is insufficient to support the court's finding that respondent became indebted to appellant upon an open book account for only \$1,873, whereas appellant claims that book account proved by him entitled him to the full sum of \$4,124. On that count the testimony indicates some irregularities and alterations in the entries on the cards and books produced as constituting appellant's "open book account," which presumably were considered by the court in settling the amount to be allowed. We find no sufficient reason for holding that this finding is not supported by the evidence.

In accordance with our opinion upon the various items as above stated we conclude that the findings and decision of the trial court in the cross-action are sustained, but that there should be a new trial of the issues in relation to counts 3 and 5 of the plaintiff's complaint. While the items contained in count 3 may have been properly allowed, they are so connected with those contained in count 5 that any change made in the evidence and findings on count 5 might affect the result in relation to count 3.

The appeal from the order denying appellant's motion for a new trial is dismissed. The judgment is reversed, and the cause remanded for a new trial to be had in accordance with the foregoing opinion.

We concur: HOUSER, J.; YORK, J.

HURTEL et al. v. ALBERT COHN, Inc.,
et al.*

Civ. 8536.

District Court of Appeal, Second District,
Division 1, California.

May 14, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Automobiles ⇨226(2)

Pedestrian's crossing of street intersection, contrary to ordinance, before second signal bell was sounded *held* contributory negligence per se so as to preclude recovery by pedestrian for injuries sustained when struck by truck, if violation of ordinance contributed proximately to the accident.

2. Automobiles ⇨244(50)

Where pedestrian, during attempt to walk across intersection on pedestrian lane, did not look in direction from which defendant's truck was approaching until it was too late to escape being struck, verdict for defendant *held* supported.

3. Trial ⇨260(8)

In action for injuries to pedestrian struck by truck, that last clear chance doctrine was allegedly not elucidated by any instructions given at defendant's request *held* not prejudicial error as against plaintiffs, where the doctrine was explained in instructions given at plaintiffs' instance.

4. Appeal and error ⇨758(3)

Where appellants complaining of giving and refusal of instructions did not print in brief all other instructions bearing on the subject, they were not entitled to have such instructions considered by appellate court (Rules of Supreme Court and District Courts of Appeal, rule 8, § 3).

5. Appeal and error ⇨1056(6)

In action for injuries to pedestrian struck by truck, allegedly erroneous ruling excluding evidence tending to establish truck driver's negligence *held* not prejudicial where manifest contributory negligence of pedestrian precluded possibility of sound judgment in pedestrian's favor.

6. Depositions ⇨90

That plaintiff was present in court *held* not to render admission of plaintiff's deposition in evidence erroneous as against plaintiff (Code Civ. Proc. § 2021).

7. Appeal and error ⇨232(2)

Grounds of objection not made at trial to the introduction of evidence may not be considered on appeal.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Loretta M. Hurtel and husband against Albert Cohn, Inc., and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Charles L. Nichols, of Los Angeles, for appellants.

Harry D. Parker, of Los Angeles, for respondents.

PER CURIAM.

Plaintiffs brought an action against the defendants to recover damages from them on account of personal injuries sustained by one of the plaintiffs in being struck by a truck that was owned by the defendant corporation (hereinafter called the defendant) and operated by one of its employees. The accident occurred at an intersection of two streets and at a point therein designated as a "pedestrian lane." From a judgment that was entered on a verdict that was returned by a jury in favor of the defendant, plaintiffs have appealed to this court.

[1,2] Appellants first complain of certain instructions that were given to the jury at the request of the defendant that related "to the doctrine of contributory negligence per se," and which arose from the fact that the injured plaintiff had attempted to cross a street at its intersection with another street, after the first, but before the second, signal bell which regulated the traffic on such streets had been rung. From a consideration of the provisions of the city ordinance introduced in evidence and which was applicable to the situation, it appears that both vehicular traffic and pedestrians were inhibited from entering the intersection until after the second bell had been rung. If, in the circumstances, the violation of the ordinance contributed proximately to the happening of the accident, by numerous decisions of appellate tribunals the "doctrine of contributory negligence per se," to which the complaint of appellants herein relates, was applicable; from which it follows that the instructions were properly given to the jury and that regardless of whether the defendant was negligent, plaintiffs were not entitled to a verdict in their favor. But aside from and independent of that situation, it very clearly appears that the verdict returned by the jury was correct, because by her own admissions, as well as by other evidence, at no

time during her attempt to walk across the intersection of the two streets did the injured plaintiff look in the direction from which the truck was approaching her until a time when it was too late for her to escape being struck by the truck.

[3,4] Appellants also predicate prejudicial error upon the fact that the doctrine of "last clear chance" was not elucidated by any instructions given to the jury at the request of the defendant; but since that doctrine was explained to the jury in instructions that were given at the instance of the plaintiffs, it is obvious that as far as that situation is concerned, appellants have no real cause for complaint. It should also be noted that because of the fact that, in violation of the provisions of section 3 of rule VIII of the Supreme Court and the District Courts of Appeal, neither as to those instructions given by the trial court to the jury at the request of the defendant, which are the subject of attack, nor as to those instructions proposed by the plaintiffs, but refused by the court, have the appellants printed in their brief "all other instructions * * * bearing upon that subject." Hence, they are not entitled to have considered by this court any of the instructions of which they complain.

[5] Appellants urge the additional point that by a specified ruling made by the trial court they were prevented from introducing certain evidence that would have tended to establish the negligence of the defendant. But conceding (without deciding) that error was made by the trial court in that regard, and that had such assumed error not been committed, the jury might have found that the defendant was guilty of negligence in the premises, again it is apparent that the manifest contributory negligence of the injured plaintiff precluded the possibility of a sound judgment in her favor.

[6,7] Finally, appellants assert that prejudicial error that affected the substantial rights of plaintiffs was committed by the trial court "in admitting in evidence the deposition of plaintiff." At the trial of the action the sole objection to the introduction in evidence by the defendant of the deposition of the injured plaintiff was that at that time the said plaintiff was present in court. That the point was without merit is attested by section 2021 of the Code of Civil Procedure; *Johnson v. McDuffee*, 83 Cal. 30, 23 P. 214, and

Newell v. Desmond, 74 Cal. 46, 15 P. 369. It is a well-established rule that on appeal grounds of objection not made at the trial of the action to the introduction of evidence may not be considered.

In view of the foregoing considerations, no other specification of error presented by appellants requires discussion by this court; and since in the record herein no error is apparent that would justify this court in a conclusion that a miscarriage of justice has resulted (section 4 $\frac{1}{2}$, art. 6, Const.), it is ordered that the judgment be and it is affirmed.



6 Cal.App.2d 690

PALACE HOTEL CO. v. CRIST.
Civ. 9660.

District Court of Appeal, First District,
Division 1, California.
May 13, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Judgment ⇨855(1)

Claim against estate based on judgment entered 20 years before *held* not barred by statute of limitations, where court granted order for enforcement of judgment (Code Civ. Proc. §§ 336, 685; Probate Code, § 708).

2. Execution ⇨69

Statute prohibiting issuance of execution on judgment against testator after his death *held* inapplicable, where judgment creditor, on obtaining order for enforcement of judgment otherwise barred, presented claim thereon against judgment debtor's estate (Probate Code, § 732).

3. Limitation of actions ⇨83(1)

Cause of action on claim against estate accrued when administrator failed to take action thereon and was not barred by lapse of one year after issuance of letters (Code Civ. Proc. § 353).

4. Judgment ⇨91

Stipulated judgment entered against two of defendants by which plaintiff waived all claims to any other sum or relief *held* not waiver of earlier judgment entered against codefendant, where earlier judgment was not referred to in stipulation.

5. Judgment ⇨91

Judgment entered 20 years before, which court, on application, ordered enforced, *held* binding on parties, even if not entered in accordance with stipulation for judgment (Code Civ. Proc. § 685).

6. Judgment ⇨910(4)

Suit to enforce claim against estate based on judgment entered against deceased 20 years before, which court ordered enforced, *held* not barred by laches (Code Civ. Proc. § 685).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Palace Hotel Company against Arthur P. Crist, as administrator of the estate of Wiley F. Crist, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

I. I. Brown, L. Seidenberg, both of San Francisco, for appellant.

Charles N. Douglas, of San Francisco, for respondent.

BURROUGHS, Justice pro tem.

On January 5, 1912, a judgment was entered in action No. 38324 of the superior court of the city and county of San Francisco, wherein the above-named Palace Hotel Company, a corporation, was the plaintiff, and George J. Dempsey, J. H. Tuttle, and Wiley F. Crist were the defendants. Said judgment was entered in favor of the plaintiff and against the defendant Wiley F. Crist in the sum of \$2,126.14, together with legal interest thereon from date until paid. On March 1, 1912, a judgment was entered against the two other defendants in the sum of \$850 and \$12.05 costs. This latter judgment was based upon a stipulation, dated February 16, 1912, between the attorney for plaintiff therein and the attorney for the two defendants last referred to. Said stipulation is as follows: "It is hereby stipulated by the parties hereto that the above-named plaintiff, Palace Hotel Company, a corporation, may take judgment against the above-named defendants, George J. Dempsey and J. H. Tuttle in the sum of eight hundred fifty (\$850.00); and no/100 dollars and costs, plaintiff hereby expressly waiving all claims to any other sum or other relief prayed for in his amended complaint on file herein." No

sum was ever paid on the judgment against Wiley F. Crist, and it does not appear, nor is it material, whether the judgment against the two other defendants was ever paid. Wiley F. Crist died June 21, 1931, and Arthur P. Crist was duly appointed the administrator of his estate on November 25, 1931, and ever since said date he has been, and now is, the duly qualified and acting administrator thereof.

On May 21, 1932, the plaintiff applied to the court for an order under the provisions of section 685 of the Code of Civil Procedure to enforce and carry into execution the judgment rendered against Wiley F. Crist on January 5, 1912, which order was granted on the day it was applied for. On May 23, 1932, a claim against the Wiley F. Crist estate, based upon said judgment, was made by plaintiff and filed in the office of the county clerk where the proceedings in the matter of said estate were pending. Said claim not having been acted upon by the administrator, the claimant elected to treat the same as rejected and commenced this action thereon on the 4th day of February, 1933. After trial, judgment was entered in favor of the plaintiff in the sum of \$5,437.60, with interest at the legal rate and costs of suit. In due time the defendant appealed from the judgment.

[1] It is contended by appellant that the complaint does not state facts sufficient to constitute a cause of action because barred by section 336 of the Code of Civil Procedure and section 708 of the Probate Code. If these two sections were the only ones bearing upon the question, counsel would be right, for section 336, *supra*, provides that an action upon a judgment must be commenced within five years from the date of the judgment, and section 708 of the Probate Code forbids the allowance of a barred claim against an estate of a decedent by an executor or administrator or a judge. However, section 685 of the Code of Civil Procedure provides that in all cases a judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings. The last-mentioned section has been construed in *Saunders v. Simms*, as administrator, etc., 183 Cal. 167, 190 P. 806, 808, which is practically on all fours with the case at bar, and it is there said: "Section 685 is a limitation upon

the operation of the statute of limitations under section 336 of the Code of Civil Procedure to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute. That is what was done in this instance." in *Faia v. Superior Court*, 133 Cal. App. 525, 530, 24 P.(2d) 567, 569, construing the effect of *Saunders v. Simms*, *supra*, the court used the following language: "* * * And when the judgment debtor has died and the statute of limitations has run against the judgment the court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected." Under the facts and the law as above cited we are satisfied the complaint herein states a cause of action and is not barred by the statute of limitations above cited.

[2] It is also claimed by appellant that the judgment appealed from violated section 732 of the Probate Code, which prohibits the issuance of an execution, after the rendition of a judgment against a testator or intestate after his death, except as provided in the Code of Civil Procedure, and provides further that: "A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims." But no execution was issued on the judgment. The procedure followed was the presentation of a claim against the estate of decedent to be paid in due course of administration in conformity with the method approved in *Saunders v. Simms*, *supra*. This point is not well taken.

[3] It is next contended that the cause of action is barred by section 353 of the Code of Civil Procedure. It appears from the evidence that the defendant's intestate died June 21, 1931; that the appellant was appointed administrator of the estate of said deceased November 25, 1931; that the claim against the estate which is the subject of this controversy was duly presented on May 23, 1932; that the administrator failing to allow or reject the claim, the claimant elected to treat said failure as a rejection thereof, and commenced this action on February 4, 1933, to recover the amount due. It is thus disclosed that one year, two months, and ten days elapsed between the time of the appointment of the

administrator and the commencement of this action. The portion of section 353 of the Code of Civil Procedure relied upon by appellant reads: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." We think a mere statement of the foregoing proposition necessarily shows that section 353, *supra*, has no bearing upon the case. The cause of action here sued upon did not accrue until after the death of the defendant's intestate by the failure of the defendant to act upon the claim.

[4,5] It is another claim that in the original action the stipulated judgment entered in March, 1912, against Dempsey and Tuttle waived the earlier judgment against Crist. We can see no connection between the two judgments. At the time of the making of the stipulation between counsel for plaintiff and counsel for defendants Dempsey and Tuttle, the judgment against Crist had already been entered, and there is no reference to it in the stipulation. The language used, "plaintiff hereby expressly waiving all claims to any other sum or other relief prayed for in his amended complaint on file herein," we think alluded to any other claims between the parties to the stipulation, but, waiving speculation as to what was intended by the language, the judgment against Crist became final long years ago, and, even if not entered in accordance with the stipulation, is binding on the parties. *Semple v. Wright*, 32 Cal. 659; *Egan v. Egan*, 90 Cal. 15, 27 P. 22; *Heller v. Dyerville Mfg. Co.*, 116 Cal. 127, 47 P. 1016; *Continental Bldg. & Loan Ass'n v. Woolf*, 12 Cal. App. 725, 108 P. 729; *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615, 617, 36 P. 928.

[6] It is further urged that, as approximately twenty years had elapsed from the rendition of the former judgment and application to the court to enforce it, that for many years the defendant owned real estate out of which the judgment could have been satisfied, that the judgment against the codefendants relieved the other defendant of liability on the judgment, and further that the judgment debtor

against whose estate it is now sought to enforce the judgment had died in the interim, such a situation constituted laches, which should bar a recovery on the part of the plaintiff. We have already held that under the record in this case it does not appear that the judgment against the codefendants in the former action relieved the other defendant from the judgment taken against him two months earlier, and which is a subsisting judgment. In *Faia v. Superior Court*, *supra*, it is said: "Whether a dormant judgment shall be enforced is a matter within the sound discretion of the trial court (11 Cal. Jur., Executions, § 12, p. 51), which may, as was done in *Saunders v. Simms*, *supra*, grant the judgment creditor leave to present a claim against the estate of a deceased debtor, and, in case of its rejection, to bring an action to establish its validity." In *Demens v. Huene*, 89 Cal. App. 748, 265 P. 389, where execution had been issued on order of the trial court, and the court subsequently recalled the execution because a period of nine years had elapsed from the date of the judgment and the making of the order directing the issuance of execution and the further ground that for a period of five years after the judgment had been entered the debtors had property upon which execution could have been levied, the appellate court held that the recalling of the execution was an abuse of discretion. It is said in 89 Cal. App. 748, at page 754, 265 P. 389, 391, of the case last cited, quoting from *Hovey v. Bradbury*, 112 Cal. 620, at page 625, 44 P. 1077, concerning the doctrine of laches: "It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent." We think it is clear that the doctrine of laches has no application here and that the trial court did not abuse its discretion in permitting the enforcement of the original judgment.

The foregoing disposes of all of the questions presented by appellant, and, as none of them are sufficient to disturb the judgment, the same is hereby affirmed.

We concur: TYLER, P. J.; CASHIN, J.

BOYLES v. KINGSBAKER BROS. CO.*

Civ. 8551.

District Court of Appeal, Second District,
Division 1, California.

May 21, 1935.

Rehearing Denied June 17, 1935.

Hearing Dented by Supreme Court
July 17, 1935.**1. Sales ☞359(1)**

Evidence in action for buyer's breach of contract by refusal to accept pears shipped and pay contract price therefor *held* to show that words, "number one grade," in contract meant such grade of fruit exchange, which executed sale contract as seller's agent, not lower "U. S. Grade No. 1."

2. Sales ☞119

Seller's breach of contract by shipping pears of lower grade than that contracted for justified buyer in declaring contract terminated, and buyer was not liable to seller for damages because of latter's inability to sell remainder of pears contracted for as much as or more than contract price.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by E. A. Boyles against Kingsbaker Bros. Company, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Lawler & Degnan, of Los Angeles, for appellant.

Hinsdale, Otis & Johnson, of Sacramento, and Moote & Longcroft, of Los Angeles (Robert W. Jennings, of Sacramento, of counsel), for respondent.

HOUSER, Justice.

As far as are necessary to a decision of the instant appeal, the facts appear to be that, acting for and in behalf of plaintiff, California Fruit Exchange entered into a contract with the defendant corporation by which California Fruit Exchange agreed to sell to said defendant, and the latter agreed to buy from the former, about 150 tons of "number one grade pears"; that, on attempted delivery of the pears, each of the first three carloads thereof received in succession and on different respective dates was rejected by the defendant for the asserted reason that the pears were inferior to and did not measure up to "number one grade," and that for such assigned reason California Fruit Exchange, as the agent of

plaintiff, acquiesced in and agreed to such rejection; that, immediately after the third car of such pears had been thus rejected, the defendant orally announced to California Fruit Exchange that the defendant would consult its attorney for the purpose of ascertaining "whether they (California Fruit Exchange) haven't broken their contract"; and that within a few days thereafter, by written communication addressed to California Fruit Exchange, the defendant notified the latter that the defendant considered the contract "at an end." In the meantime, and on different respective dates, plaintiff had shipped to the defendant a fourth and a fifth car of pears, each of which, for a reason identical with that theretofore given as to each of the first three cars, was likewise rejected by the defendant; and, as before, the said rejection was agreed to and acquiesced in by California Fruit Exchange. Thereafter, but prior to a time when plaintiff had become personally aware of the fact that the defendant had declared the contract "at an end," plaintiff had shipped four other cars of pears to the defendant; but, as before, and for the reason, applicable to each of such four cars, which theretofore had been assigned for the rejection of each of the preceding cars, the defendant declined to accept them, or any of them. The remainder of his pears, consisting of two cars thereof, plaintiff shipped to New York City, where they were sold. In a subsequent action brought by plaintiff against the defendant to recover from it a judgment for alleged damages that plaintiff claimed had resulted to him from the refusal of the defendant to accept the pears contained in the fourth to the eleventh cars, inclusive, as "number one grade" and to pay to plaintiff the contract price therefor, a judgment was rendered in favor of plaintiff. It is from that judgment that the instant appeal is taken.

[1,2] On the trial of the action, plaintiff contended that the pears that had been shipped to the defendant were "U. S. grade No. 1," and, consequently, that the defendant had no right to reject them. On the other hand, the defendant asserted that even though it should concede that the greater part, although not all, of the pears were of the quality known as "U. S. grade No. 1," still they did not measure up to the terms of the contract, for the reason that the contract was not made with reference

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 141.

to such a standard of quality, but that, to the contrary, the "number one grade" contemplated by the parties to the contract and which they had in mind at the time of its execution, and as to which part of the contract the minds of such parties had met, was "number one grade of California Fruit Exchange," which was a higher grade than "U. S. grade No. 1"—especially in the condition that whereas, by the requirement applicable to "U. S. grade No. 1," a "tolerance" (or departure from perfect fruit) of 10 per cent. was permissible—by the requirements applicable to the "number one grade of California Fruit Exchange," a "tolerance" of not to exceed 5 per cent. was allowable. In that respect the testimony given by the representative of California Fruit Exchange and the representative of the defendant, by whom the contract was made for their respective principals, was in entire agreement, one with the other, to the effect as thus contended by the defendant. In addition thereto, the acts and conduct generally of such representatives with reference to the rightfulness of the rejection of the pears by the defendant, for the reason hereinbefore set forth, was corroborative of the intention of the parties to the contract with regard to the quality of the pears that was the subject of their agreement. As to that point, no evidence was introduced to the contrary.

If it may be assumed that the words "number one grade," by force of their ordinary significance, were uncertain in their designation of the quality of the fruit that related to the contract, it is clear that the evidence adduced on the trial of the action could leave no doubt regarding the meaning that was properly attachable to such words. Considering the fact that at least as to the first three of the cars that were shipped to the defendant, plaintiff breached his contract, the defendant was thereupon and thereafter justified in declaring the contract "at an end," and, consequently, was not liable in damages that may have resulted to plaintiff because of his assumed inability to sell the remainder of his pears at a price equal to or greater than the price at which he had contracted to sell them to the defendant. *Lindborg Milling & Elevator Co. v. Danzero* (Mo. App.) 193 S. W. 606; *Morrison, etc., Co. v. Leiser*, 73 Mo. App. 95, 98; *Ungerer & Co. v. Louis Maull C. & F. Co.*, 155 Mo. App. 95, 134 S. W. 56; *McDonald v. Kansas City B. & N. Co.* (C.

C. A.) 149 F. 360, 8 L. R. A. (N. S.) 1110, and authorities therein cited.

It becomes unnecessary to discuss other points presented on the appeal.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.



6 Cal.App.2d 633

**BRUCE v. CIVIL SERVICE BOARD OF
CITY OF OAKLAND et al.**

Civ. 9594.

District Court of Appeal, First District,
Division 1, California.

May 7, 1935.

1. Municipal corporations ⇨58

City charter which has been approved by Legislature and is in force must be construed as a law enacted by Legislature.

2. Municipal corporations ⇨58

To ascertain meaning or intent of various provisions of city charter, different sections or provisions must be read together with view to harmonizing them.

3. Municipal corporations ⇨216(2)

In construing city charter, latitude is given to civil service boards to adopt rules governing method of examination and markings, so long as rules are within provisions of charter and in consonance with fundamental principles thereof.

4. Municipal corporations ⇨216(1)

Civil service commission derives its powers from charter creating it and may not exercise any powers not directly given or necessarily implied from those conferred, and rules adopted by commission have force of law if they are within powers conferred by charter.

5. Municipal corporations ⇨216(2)

Civil service commission cannot, under guise of exercising rule-making authority, alter charter which has created commission.

6. Municipal corporations ⇨184(2)

Civil service board could not justify its rule providing that no one may be examined for position of police officer unless he has twelfth grade certificate or educational equivalent on ground that charter conferred upon board power to make rules for examinations,

where charter conferred upon board power merely to make rules regulating method of examinations, and application of rule was denial of privilege of competing in examination.

7. Municipal corporations ☞184(2)

Clause "able to read and write the English language" within city charter providing that no person shall become member of police department unless he shall be able to read and write the English language *held* to mean ability to read and write English with sufficient understanding and comprehension to discharge duties of positions to which applicants seek to be appointed, in view of other sections of charter providing that examinations shall be for purpose of determining qualifications of applicant for position and shall be practical and shall fairly test fitness of person examined.

8. Municipal corporations ☞184(2)

Under city charter provisions that every applicant for position of police officer shall be able to read and write English language, and that examination shall be for purpose of determining qualifications for particular position and shall be practical and shall fairly test fitness of applicant to discharge duties of position which he seeks, civil service board *held* without authority to adopt rule that one may not compete in examination unless he presents twelfth grade certificate or educational equivalent.

9. Mandamus ☞168(3)

In mandamus proceeding to compel civil service board to permit applicant for position of police officer to compete in examination, notwithstanding he did not present twelfth grade certificate or educational equivalent, evidence showing reasonableness of construction placed upon clause "able to read and write English" within charter provision that no person shall become member of police department unless he shall be able to read and write the English language, as the equal of completion of twelfth grade or educational equivalent, *held* properly excluded, since evidence could not aid court in determining whether board had right to exclude one from competing in examination.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Mandamus proceeding by W. W. Bruce against the Civil Service Board of the City of Oakland and others. From a judgment issuing writ of mandate, defendants appeal.

Affirmed.

F. Bert Fernhoff, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, for appellants.

Decoto & St. Sure, of Oakland, for respondent.

PER CURIAM.

Appeal from judgment of superior court, for the county of Alameda, issuing writ of mandate against civil service board.

W. W. Bruce applied to the civil service board of Oakland for leave to take the examination for the position of patrolman in that city. His application was denied because among his listed qualifications was not that of "(5) Education: Completion of 12th Grade," a prerequisite which the notice of examination specified. On his petition the superior court for the county of Alameda issued a writ of mandate, ordering said board to permit him to compete; thereafter, on appropriate proceedings therefor, said court enjoined the conducting of examinations for patrolman or the preparing of an eligible list until such time as the appeal in the proceeding numbered 9594 should reach finality. The appeals in the injunction and in the mandamus proceedings are consolidated as the determination of the latter will settle the controversy. (Page 7, appellant's brief.)

Oakland operates governmentally under a city charter. Section 88 of article XIV thereof, in part here material, reads: "Qualifications. No person shall become a member of the Police Department unless he shall be * * * able to read and write the English language. * * *"

Article XIII captioned "Civil Service," provides: "Rules. Section 73. The Board shall make rules to carry out the purposes of this article, and for the examinations, appointments and promotions. All rules and all changes therein shall be forthwith printed by the Board for distribution.

"Examinations. Section 74. All applicants for places in the classified civil service, shall be subjected to examination, which shall be public, competitive and free. The Board shall hold such examinations on the first Monday in April and the first Monday in October of each year, and oftener if it deem necessary. Such examinations shall be for the purpose of determining the qualifications of applicants for positions, and shall be practical and shall fairly test the fitness of the persons

examined to discharge the duties of the positions to which they seek to be appointed."

The civil service board adopted rule 25 which follows: "Rule 25 Qualifications (a) Education. The rating in 'education' shall be determined from evidence of schooling or of specialized study which would indicate that the candidate's abstract and practical knowledge is within the scope of the minimum qualifications."

The appellant contends that the civil service board has power to establish an educational qualification of completion of twelfth grade or its equivalent, for applicants in entrance examinations into the police department by virtue of section 73 of the Charter, and, therefore, that it rightfully denied petitioner and respondent permission to participate therein. The petitioner and respondent agrees that the position of patrolman is within the classified civil service of the city, and that appointments thereto must be made from an eligible list established by the board, after examination. He claims, however, that sections 73, 74, and 88 of the charter cannot be construed so as to permit the board to prescribe a rule which will deny the applicant the right to take an examination on a free, open, and competitive basis, provided said applicant meet the minimum qualification established by the charter which is, in this behalf, that he be able to read and write the English language. The appellant board seeks to justify the exclusion from the right to be examined of all persons who have not twelfth grade standing, upon the theory that police departments should be graded up and that members thereof should possess a high standard of education. This view, however, does not meet the point. Assuming merely for illustration that under sections 73 and 74 of the Charter, the civil service board would have the right to set as a standard to be attained by the persons examined the equivalent of twelfth grade standing, it does not follow that the board would have the right to exact twelfth grade standing as a condition of taking the examination. Section 88 of article XIV provides that every applicant for the position in question shall be able to read and write the English language, while section 74 provides that examinations shall be for the purpose of determining the qualifications for the particular position and shall be practical and shall fairly test the fitness

of the applicant to discharge the duties of the position which he seeks.

[1] When a city charter has been approved by the Legislature and is in force, it is to be construed as a law enacted by the Legislature. *Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676; *Stern v. City Council of City of Berkeley*, 25 Cal. App. 685, 145 P. 167; *Taylor v. Cole*, 201 Cal. 327, 257 P. 40; *Whitmore v. Brown*, 207 Cal. 473, 279 P. 447.

[2] To ascertain the meaning or intent of the various provisions of the charter, different sections or provisions must be read together, with a view to harmonizing them. *Marshall v. Williams*, 85 Cal. App. 507, 259 P. 970; *Crowe v. Boyle*, 184 Cal. 117, 193 P. 111.

[3] It is a general principle of statutory construction as applied to charters, that latitude is given to civil service boards to adopt rules governing method of examination and markings, so long as the rules so made are within the provisions of the charter and in consonance with the fundamental principles thereof. *Mitchell v. McKevitt*, 128 Cal. App. 458, 17 P.(2d) 789.

[4] A civil service commission derives its powers from the charter creating it and may not exercise any not directly given or necessarily implied from those conferred. Rules adopted by a commission have the force of law if they are within the powers conferred upon the commission by the charter. *Haub v. Tuttle*, 80 Cal. App. 561, 251 P. 925.

[5] A rule within the scope of its application has the force and dignity of a law, but since the board owes its existence to the organic instrument it cannot, under the guise of exercising a rule-making authority, alter the instrument which has created it.

[6] Counsel for appellants would uphold the rule of the board that no one may be examined unless he has twelfth grade standing or its equivalent, first, upon the ground that section 73 confers upon the board the power to make rules, to carry out the purposes of the article and for examinations, appointments, and promotions, so that any rule that it might make would have the force of law, even though it would seem to go beyond a power directly conferred by the charter. They contend that there is an analogy between the instant case and that illustrated in *State ex rel.*

Attorney General v. Covington, 29 Ohio St. 102, where it is held that a legislative act may add to the qualifications established by the state Constitution. To their argument there is the double answer that the position announced in the case last referred to is contrary to the general rule, as the same is laid down in the following cases: State ex rel. Childs v. Holman, 58 Minn. 219, 59 N. W. 1006; Gibbany v. Ford, 29 N. M. 621, 225 P. 577; State ex rel. Chandler v. Howell, 104 Wash. 99, 175 P. 569; McCool v. State, 149 Miss. 82, 115 So. 121; further, section 73 does not purport to confer upon the board the power assumed for it by appellants, because it confers upon the board the power merely to make rules regulating the method of such examinations, and the rule, the adoption of which precluded the taking of an examination in this case, had nothing to do with the method of an examination, but rather was one the application of which was a denial of the privilege of competing in an examination.

[7] The question discussed in the briefs, as to whether the clause "able to read and write the English language," as found in section 88, establishes the minimum or maximum educational qualification for admission to the police department, would perhaps be of significant interest if section 88 of the Charter stood alone and contained the only educational qualification. When, however, it is read in connection with section 74, it becomes apparent that, without regard to definitions by lexicographers or found in cases, it is an expression of elasticity and must be held to mean the ability to read and write English with sufficient understanding and comprehension "to discharge the duties of the positions to which they seek to be appointed," in this case sufficiently understandingly to be a police officer.

In the case of Helton v. Burdette, 180 Ky. 492, 203 S. W. 189, it is held that ability to read as a voting qualification must be tested by sentences composed of words in common use and of average difficulty; while in Williams v. Hays, 175 Ky. 170, 193 S. W. 1046, it is held that ability to read, as a voter's qualification, is demonstrated if the voter can read, in a reasonably intelligent manner, sentences composed of words in common use and of average difficulty, although each word need not be accurately pronounced, and the voter's ability to write is manifested if he can, by

use of alphabetical signs, express, in a fairly legible way, words in common use and of average difficulty, though each word may not be accurately spelled.

These cases, however, by reason of the provisions of section 74 of the Charter, on civil service, do not confine the civil service board within the limits of the definitions therein contained, and that board has a wide discretion necessarily in determining, first, what standard will satisfy the requirement that he read and write well enough to discharge the duties of a police officer, and, second, whether, after examination, the applicant has measured up to the standard, and it has been held in this state that courts are reluctant to review the markings of commissions. Mitchell v. McKevitt, *supra*.

[8] Therefore, it is concluded that when sections 73 and 74 are read with section 88, in the light of the foregoing principles, that a civil service board has transgressed its authority and has, in effect, adopted a rule amendatory of the charter by denying one the right to take an examination which will practically and fairly test his fitness to become a police officer, by adopting the standard that he may not compete unless he presents a twelfth grade certificate or evidence that his education bespeaks such ability as that certificate may be held to indicate.

There is no case cited by appellants which goes to the length of holding that a commission, by the adoption of a standard such as the one here in question, may foreclose the right of examination, at least where charter provisions are similar to those found in that of the city of Oakland.

Appellants complain that the trial court committed error in excluding evidence offered below to show the reasonableness of the construction placed upon the clause "able to read and write English" as the equal to completion of twelfth grade, or its educational equivalent, the evidence consisting of an offer to prove that a large percentage of those who had in the past failed in written examinations were persons whose education was not that of completion of twelfth grade or its equivalent. Another assignment of error is the exclusion of the testimony of August Vollmer, former police chief of Berkeley, for the purpose of showing the reasonableness of the board's rule. Apparently with the same view excerpts from the Wickersham re-

port to the President of the United States were offered, and excluded.

[9] There is no error in these rulings for the reason that neither the testimony of witnesses nor of the facts sought to be introduced could aid the court in determining the question of law: Had the civil service commission the right, under the guise of making a rule for carrying out the purposes of the article on civil service, to exclude one from competing in order that his fitness be practically and fairly tested by examination?

Appellants contend that the rules of the civil service board are given the force and effect of law. *Timmins v. Civil Service Commissioners* (1931) 276 Mass. 142, 177 N. E. 1, 75 A. L. R. 1232. And, further, that they have the same force as provisions of the charter, citing *Mitchell v. McKeivitt*, supra. The last case, as has been seen, holds, however, that they have the same force when they are within the provisions of the charter, and the *Timmins* Case must be read in the light of the qualification placed upon the rule-making power by the case of *Mitchell v. McKeivitt*, and, if it goes beyond the latitude given a commission by the *McKeivitt* Case, it would not control in this state.

The facts of the *Timmins* Case are that the position of director of school of hygiene became vacant. The school committee requested the civil service board to hold an open competitive examination to create an eligible list from which the school committee might fill the vacancy. The commissioners, ignoring the request for an open competitive examination, gave notice of a promotional competition, limiting the applications to persons then in the department. The petitioner and several others applied to take the examination. Only the petitioner appeared at the time and place fixed. He was told that no examination would be held. Later the commission announced an open competitive examination. Petitioner contended that the board had no right to refuse to examine him, nor to order an open competitive examination, without having first held an examination limited to the school physicians of Boston. The court held that for many years the commission had given such examinations, promotional or open, as the appointing power had requested it to do, but that in this case no definite statutory rule controlled the action of the civil service com-

mission, the statute requiring that the rules of selection should include "promotions, if practicable, on the basis of ascertained merit in the examination and seniority of service," but that no rule existed by statute requiring positions to be filled by promotions except in the police service. In a word, the case involved a question of construction of the statute of the state of Massachusetts not in *pari materia* with the provisions of the charter of Oakland.

In brief, it appears that the rule under criticism is not adapted to "carry out the purposes of this article" (civil service); it constitutes an unwarranted addition thereto.

For the foregoing reasons, the judgment is affirmed.



6 Cal.App.2d 761

W. W. BRUCE, Plaintiff and Respondent, v. CIVIL SERVICE BOARD OF CITY OF OAKLAND, Bernard Silverstein, John Irish, and Chester Morris, as Members thereof, and Herbert Graham, as Secretary and Chief Examiner of said Board, Defendants and Appellants.

Civ. 9663.

District Court of Appeal, First District,
Division 1, California.
May 7, 1935.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

F. Bert Fernhoff, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, for appellants.

Decoto & St. Sure, of Oakland, for respondent.

PER CURIAM.

Appeal from the superior court of the county of Alameda enjoining examination by civil service board.

For the reasons given in the consolidated case, 45 P.(2d) 419, the judgment of the superior court enjoining the holding of the examination pending the determination of the mandamus proceeding is affirmed.

7 Cal.App.2d 61

**STEWART et al. v. JUSTICE'S COURT OF
LINDSAY TP. et al.**
Civ. 1275.

District Court of Appeal, Fourth District,
California.

May 17, 1935.

I. Justices of the peace Ⓒ86(4)

Under statute authorizing party in justice court to deposit, in lieu of a required undertaking, an equal amount of money in United States gold coin, deposit of lawful currency would be sufficient in view of presidential executive orders, based on act of Congress, prohibiting and making impossible the use of gold coin for such purpose (Code Civ. Proc. § 926; Executive Order Nos. 6073, 6102, 12 USCA §§ 95 note, 248 note).

2. Justices of the peace Ⓒ86(4)

Where attachment plaintiff in justice court, instead of making \$50 cash deposit in lieu of statutory undertaking, gave check for such amount to justice, but, before discharge of attachment because of such irregularity was sought, justice cashed the check, irregularity held cured and defendants were not entitled to discharge of the attachment (Code Civ. Proc. § 926).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Mandamus proceeding by E. S. Stewart and another against the Justice's Court of Lindsay Township and the Honorable E. B. Gould, justice of such court. Judgment for petitioners, and respondents appeal.

Reversed.

James R. McBride, of Lindsay, for appellant.

Ward G. Rush, of Tulare, for respondents.

BARNARD, Presiding Justice.

On April 20, 1933, one Baker brought an action against these petitioners in the respondent justice's court and secured a writ of attachment by delivering to the justice of the peace his own personal check for \$50 in lieu of a written undertaking. A motion to discharge this writ, on the ground that no sufficient undertaking had been filed, was denied on May 13, 1933; the respondent justice having theretofore cashed the check. On May 25, 1933, upon the stipulation of the petitioners, judgment was entered against them. On that day

notice was given of another motion to discharge the attachment on the same ground as before, which motion was denied on May 31, 1933. On June 2, 1933, the petitioners filed in the superior court of Tulare county a petition for a writ of mandate compelling the respondent justice to enter an order discharging the attachment. In due course, judgment was entered ordering that such a writ of mandate issue, and from this judgment this appeal was taken.

The sole question presented is whether the delivery of a check for \$50 to a justice of the peace, which was subsequently cashed by the justice, constituted a sufficient undertaking or security for the issuance of a writ of attachment under the statutes which were then in force.

Section 867 of the Code of Civil Procedure then provided that before issuing such a writ the justice must require a written undertaking with two or more sufficient sureties in a sum not less than \$50. Section 926 of that Code then provided that in all civil cases in a justice's court, where an undertaking was required, an equal sum of money in United States gold coin might be deposited with the justice and should be taken as security in place of the undertaking.

The purpose of these statutes was to furnish security in a given amount to a party whose property was to be attached. Illustrating and carrying out this purpose, and to prevent the discharge of an attachment because of a mere technical insufficiency in the undertaking, section 558 of that Code provides that upon an application for the discharge of such a writ, as improperly or irregularly issued, the same shall not be discharged if at or before the hearing of the application the undertaking in question is amended so as to conform to the requirements.

In the instant case, no attempt was made to furnish the written undertaking provided for in section 867. An attempt was made, however, under section 926, to deposit the cash in lieu of a written undertaking. It must be conceded that the latter statute was not strictly complied with, in that gold coin was not deposited with the court and in that no cash or money of any kind was in the hands of the justice before the writ of attachment was issued. The question remains whether such an at-

tempt to deposit money as such security is a nullity, or whether it constitutes a sufficient compliance with the statute, any irregularity being cured by the subsequent cashing of the check.

[1] Petitioners make no point of the fact that gold coin was not deposited, but base their contention solely on the fact that no lawful money was in the hands of the justice before the writ was issued. Nor do we think an objection based upon the failure to deposit gold coin was available to them. By executive orders issued by the President of the United States on March 10, 1933 (No. 6073, 12 USCA § 95 note) and April 5, 1933 (No. 6102, 12 USCA § 248 note) based upon an act of Congress passed on March 9, 1933 (48 Stat. 1), the use of gold coin for such purpose was prohibited and made impossible. See *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A. L. R. 1352.

[2] An attempt was here made to provide security for the petitioners by a deposit of money in lieu of a written undertaking. In view of the holding of the United States Supreme Court, we think it must be held that a deposit of lawful money at that time would have been a sufficient compliance with the statute. While a check is not lawful money, it is a commonly accepted method of transferring money. This check was an order on the bank for the money and was paid on presentation. The justice could have cashed the check before issuing the attachment and his neglect to do so should not be charged to the plaintiff in the action. While such a failure on the part of the justice constituted an irregularity which would continue until the check was cashed, when this occurred the money was in the hands of the court as contemplated by section 926, in so far as it was in the power of any litigant to comply with that section after the passing of the act of Congress and the issuance of the executive orders above referred to. Thereafter, with the money in the hands of the court, the petitioners had better security than they would have had under any written agreement to pay a similar sum in the same kind of money.

Conceding that attachment proceedings are statutory and that the statutes must be complied with, the essential purpose of this statute, the furnishing of such secur-

ity, should not be lost sight of. This was accomplished here, and the giving of a check which was cashed was not a mere nullity. When the discharge of the attachment was asked for, any irregularity that had existed had been corrected and the justice knew that the check he held before issuing the writ was good, that as a matter of fact it was and had proved to be the equivalent of cash, and that he then had the actual money in his possession. While section 558 relates to written undertakings, and not to a deposit of cash in lieu thereof, it discloses an intention to prevent the discharge of an attachment on a mere technical insufficiency in the undertaking which has been corrected before the discharge is asked for. We think a court should and does have the inherent power to carry out the real intent of the statutes and to refuse to discharge an attachment where such an irregularity as here appears has been fully corrected and the money is in the hands of the court. Any other holding would give to the statute not merely a strict but an unreasonable construction. In our opinion, there was a substantial and sufficient compliance with this statute, and the petitioners were not entitled to a discharge of the attachment at the times the motions therefor were made.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 77

PRICE v. McDONALD et al.

Civ. 8889.

District Court of Appeal, Second District,
Division 1, California.

May 20, 1935.

I. Automobiles ☞240(1)

In action for injuries sustained as result of coasting of unoccupied automobile after parking thereof, complaint which alleged negligence of defendants in general terms held not to prevent application of *res ipsa loquitur* doctrine, especially where allegation as to negligent parking was stricken.

2. Pleading Ⓒ245(4)

In action for injuries resulting from movement of unoccupied automobile, amendment of complaint at close of plaintiff's case by striking out allegation of defendants' negligence in parking automobile *held* not error, where plaintiff offered no evidence as to manner of parking car.

3. Automobiles Ⓒ242(2)

Negligence of owner of automobile and his daughter who parked automobile in driveway was presumed under *res ipsa loquitur* doctrine, where automobile coasted down drive and struck plaintiff some six hours later, and evidence indicated that automobile, after parking thereof, was in control of both defendants.

4. Automobiles Ⓒ242(2)

Mere proof that defendants safely parked automobile in driveway *held* not to relieve defendants of liability under *res ipsa loquitur* doctrine, when automobile six hours later coasted down driveway and struck plaintiff, causing injuries.

Appeal from Superior Court, Los Angeles County; Hillard Comstock, Judge.

Action by David Thomas Price, a minor, by Thomas C. Price, his guardian ad litem, against P. A. McDonald and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edwards & Taylor, of Los Angeles, for appellants.

J. Marion Wright, of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action by his guardian ad litem, plaintiff recovered judgment against defendants P. A. McDonald and Mrs. Everett Mulconery in the sum of \$2,000 for injuries received when an automobile coasted out of a driveway in the nighttime, crossed a public street, and crashed through the wall of a dwelling house where plaintiff was sleeping.

The complaint alleged negligence on the part of the defendants, in that they negligently parked said automobile in their yard, "and so negligently maintained said automobile and cared for same and so negligently controlled same" that the automobile backed from the yard, struck the house where plaintiff was sleeping, and caused his injuries.

[1,2] On this appeal, appellants seek a reversal because the court applied to the facts of the case the doctrine of *res ipsa loquitur* and instructed the jury thereon, and they contend the doctrine does not apply. They invoke the rule that, where specific acts of negligence are charged, plaintiff must rely thereon, and not upon the *res ipsa loquitur* doctrine. At the close of plaintiff's case, the court allowed an amendment of the complaint by striking out the allegation of negligence in the parking of the car. No evidence was offered by plaintiff as to the manner in which the car was parked. The amendment was properly allowed, although we think it was unnecessary. The allegation of negligence in maintaining, caring for, and controlling the automobile charged negligence in general terms, and the complaint was unobjectionable as the basis for the application of the doctrine of *res ipsa loquitur*. *Chauvin v. Krupin* (Cal. App.) 40 P.(2d) 904.

[3,4] It is also contended that the doctrine was improperly applied because two defendants were charged, and negligence can only be presumed where one person is in the exclusive control of the instrumentality. No cases are cited so holding, and we are not aware of any such rule. It is true, of course, as was said in *Harrison v. Sutter St. R. Co.*, 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, that, where there are two instrumentalities in charge of separate defendants, either one of which may have been responsible for the accident, there is no presumption that both defendants were negligent; that fact being one to be determined by the jury. It is also true that, where the one charged is in control of the instrumentality only a part of the time and the accident may have happened while he was not in control, he will not be presumed to have been negligent. But we have a case here where the defendants were jointly charged with negligence in the management and control of the one instrumentality which caused the injury, and the implied finding of the jury was that both were guilty of negligence. This finding is supported by the evidence. Defendant McDonald was the owner of the car. Mrs. Mulconery is his daughter. She lived with him, and was allowed to use the car whenever she chose. She brought the car home about 4 o'clock p. m. on the day of the accident and parked it on a supposedly level spot at the upper end of the driveway.

Some six hours later it coasted down the drive and struck plaintiff. McDonald testified that he had charge of the car in the nighttime. We cannot say that the jury was obliged to find that the car was exclusively under the control of either of the defendants or that it was less under the control of one than of the other. The control was in both of them, and there is no basis upon which their responsibility could be divided. In such a case the doctrine of *res ipsa loquitur* applies to the conduct of both of the defendants or to neither of them. Had they been able to offer a satisfactory explanation as to the cause of the accident, either one or the other or both of them might have been absolved from liability, but the duty of explanation was upon them and not upon the plaintiff. They did not undertake to explain how the car came to be set in motion, and it does not appear that either of them used the car after 4 o'clock in the afternoon. The accident did not happen until about six hours later. Under these circumstances, either both of the defendants will be presumed to have been negligent or the presumption will not be applied to either of them. Unquestionably, where the responsibility was equal, they will both be presumed to have been negligent.

The period of time that elapsed between the parking of the car and its descent down the driveway is relied upon by appellants as establishing their want of negligence in the parking of the car.

Appellants rely upon the case of *Joseph v. Schwartz*, 128 Wash. 634, 224 P. 5, in which it was held that no negligence was shown by the fact that an automobile coasted down hill some six hours after the owner parked it on the street. The allegation of negligence in that case was that "the defendant so carelessly parked the car on the sloping street and so negligently secured it that the automobile by reason of the negligent parking and securing, started down the street and ran upon and damaged the plaintiff's property." The owner was called to the stand by plaintiff, and testified that he parked the car securely at 6:30 or 7 p. m., observed it where he left it at 12 or 1 o'clock, when he went to bed. Of this situation the court said: "Can we say that when an automobile parked on an incline sufficient to start it in motion as soon as the brakes are released, having so stood for at least five or six hours, thereafter is

shown to have moved, that its moving may be by the jury presumed, in the absence of explanation, to be the result of negligence in securing it in the first instance?" In holding that the doctrine of *res ipsa loquitur* was not applicable to such facts, the court evidently considered only the single act of negligence pleaded, the negligent parking and securing of the car in the first instance. The complaint in the present case is much broader, as we have seen, alleging negligence in general terms. We are of the opinion that under such allegations a presumption of negligence arises when an unattended automobile coasts down a hill and that, upon proof of these facts, it becomes incumbent upon the person having control to explain the cause of the car's movement. Defendants in the case at bar did not relieve themselves from liability by mere proof that they safely parked the car. Their testimony to that effect enables them to argue with plausibility that some one else must have interfered with the car, but that argument was one for the jury, and does not constitute a sufficient defense, in the absence of all evidence that such was the fact. We are of the opinion that the case made by plaintiff satisfactorily establishes all of the elements necessary to bring into operation the doctrine of *res ipsa loquitur*. If the doctrine is applied, then admittedly the plaintiff must prevail, because the cause of the accident remains unexplained.

Appellants criticize a number of the instructions given to the jury at the request of respondent, but we think the criticisms are without substantial merit. The instructions in some particulars were not carefully drawn. They were correct, however, as to the general issue of negligence, and properly stated the *res ipsa loquitur* doctrine. They were so drawn as to allow the jury to find either or both of the appellants guilty of negligence and to return a verdict against either or both. Appellants take the position that the only liability of McDonald would be that of an owner of the car, under section 1714¼ of the Civil Code, and that under the evidence no question of his negligence is involved. For the reasons we have stated we cannot agree with this view. There was evidence from which the jury could properly infer that McDonald had equal control of the car with Mrs. Mulconery, and, such being the case, the instructions stated the law with sufficient clearness and accuracy.

Appellants complain of the refusal of the court to give an instruction requested by them. The instruction was requested after the taking of evidence was completed, did not relate to matters of law not disclosed by the pleadings, and appears to have been refused for this reason. Section 607a, Code Civ. Proc. Nevertheless we have read the instruction, and are satisfied that it was properly refused. It was somewhat ambiguous and added nothing to the instructions already given.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 82

**COUNTY OF SAN BENITO v. COPPER
MOUNTAIN MINING CO. OF CALI-
FORNIA et al.
Civ. 9533.**

District Court of Appeal, First District,
Division 1, California.
May 21, 1935.

Hearing Denied by Supreme Court
July 17, 1935.

1. Eminent domain ☞178

Where title to land became vested in third party pending condemnation proceeding, refusal to permit third party to intervene and answer *held* not error, where third party was permitted to file amended answer setting forth defenses to proceeding and to introduce evidence in support thereof, and award for value of land was made in favor of third party (Code Civ. Proc. §§ 385, 1238).

2. Eminent domain ☞41

Judgment condemning land for public "park" was not invalid on ground that resolution of board of supervisors was passed with intention of making gift of land to United States, where statute authorizing such gift became effective before rendition of judgment (Code Civ. Proc. § 1238; St. 1929, p. 1042, § 3).

A "park" is a place of recreation and enjoyment for general public, regardless of whether park is designed for use of the people of a town, county, or state.

[Ed. Note.—For other definitions of "Park," see Words & Phrases.]

3. Eminent domain ☞134

Owner of condemned land was not entitled to severance damages on ground that land was only source of water available for operation of nearby mines, where owner did not show right to use water and land for which severance damages was claimed was owned by third party (Code Civ. Proc. §§ 1238, 1248 (2)).

4. Eminent domain ☞150

\$11,875 for land and \$1,500 for leasehold *held* adequate for 160 acres of land condemned for public park, where value of land was estimated from \$5,000 to \$1,000,000 and defendant's estimated severance damage was \$300,000 (Code Civ. Proc. §§ 1238, 1248 (2)).

5. Eminent domain ☞67

Objection that proof did not show existence of public necessity for park for which land was condemned would not be considered in absence of showing of fraud, bad faith, or abuse of discretion by board passing resolution, since passage of resolution was conclusive evidence of public necessity (Code Civ. Proc. §§ 1238, 1241).

Appeal from Superior Court, San Benito County; James L. Atteridge, Judge.

Condemnation proceeding by County of San Benito, State of California, against Copper Mountain Mining Company of California and others. From the judgment, defendants appeal.

Affirmed.

M. H. Peterson, of San Francisco (C. E. Peters, of Oakland, and Edward F. Treadwell, of San Francisco, of counsel), for appellants.

A. M. Runnells, of Hollister, and Wyckoff, Gardner & Parker, of Watsonville, for respondent.

PER CURIAM.

This is an action by plaintiff to condemn, for a public park, a certain tract of land consisting of 160 acres. The action was commenced on February 1, 1930. The preliminary resolution was adopted January 15, 1929. In the complaint the names of the owners of the land were given as Copper Mountain Mining Company of California; R. L. Handy and W. W. Colquhoun, trustees for California Home Building Loan Company, a corporation; California Home Building Loan Company, a corporation; Olive A. Rivers and A. L. Crawford. Handy, Colquhoun, and Crawford filed disclaimers;

Olive A. Rivers answered, alleging a leasehold interest in the property. The Copper Mountain Mining Company answered alleging ownership of said land and ownership of certain mining claims in the immediate vicinity of the said land; that the land sought to be condemned was the only source of water available for the working of these mining claims; that the value of said land was \$1,000,000 and that the damage for severance of said land from the mining claims was \$300,000.

On June 22, 1933, in the Southern Division of the United States District Court, in and for the Northern district of California, a stipulated judgment was rendered in favor of the Titanic Copper Mountain Mining Company of Arizona and against the said Copper Mountain Mining Company of California, decreeing the title to all of the land herein sought to be condemned to be in the Titanic Company. Thereafter, on June 26, 1933, the same being the date upon which this action was set for trial, the said Titanic corporation presented a motion to be permitted to intervene and answer. This proceeding culminated in an order by the court that the said Titanic Copper Mountain Mining Company be permitted to defend in the name of the Copper Mountain Mining Company of California, and for this purpose that the answer be amended to set forth the defenses pleaded in the answer of the said Titanic Company. Thereupon the answer was so amended, served, and filed. This amended answer alleged, among other things, that the said Titanic Company by virtue of said decree was the owner of the 160 acres sought to be condemned; that the said Copper Mountain Mining Company was the owner of the said mining claims; that the said 160 acres had a market value of \$1,000,000 and that the severance damage to the Copper Mountain Mining Company was the sum of \$300,000, and it prayed that the award for value of said land be made to the Titanic Company, and that the severance damages be made to the Copper Mountain Mining Company. The trial then proceeded under the amended answer of the said Titanic Company.

There is a decided conflict in the testimony as to the value of the land taken. On behalf of defendants there was testimony of value from \$100,000 to \$1,000,000. On the part of plaintiff the testimony varied from \$5,000 to \$8,000. An

expert appointed by the court put the value at \$12,000. The court found that the value of said land sought to be condemned was the sum of \$11,875, and that the value of the lease was \$1,500, the value of said leasehold to be deducted from the gross value, and judgment was entered accordingly. No award for severance damages was made. From this judgment, defendants have appealed.

[1] Appellants contend that the Titanic Company should have been permitted to intervene and answer. We can see no error in the refusal of the trial court to permit this intervention. The Titanic Company was permitted to file an amended answer wherein it set forth all of its defenses to the action. It went to trial and produced evidence in support of the matters contained in said amended answer, and the award for the value of the land was made in its favor. Under section 385 of the Code of Civil Procedure, in case of any transfer of interest, other than that caused by the death or disability of a party, the action may be continued in the name of the original party, or the court may allow the person who succeeds to the interest to be substituted in the action, the matter being in the discretion of the court. *Alameda County Home Inv. Co. v. Whitaker*, 217 Cal. 231, 18 P.(2d) 662.

[2] Appellants' next contention is that the resolution of the board of supervisors condemning this land for a park was not passed in good faith, but with the intention to make a gift of it to the United States for which there was then no statutory authority. There was, however, statutory authority for the making of this gift shortly after this resolution was passed. The act of the Legislature which became a law on August 14, 1929, provided that: "The boards of supervisors of the several counties are hereby authorized and empowered to grant, transfer and convey without consideration any real property or interest therein now owned or that may hereafter be acquired by any county to the United States of America to be used for national park purposes." Stats. 1929, p. 1042, § 3. Section 1238 of the Code of Civil Procedure authorizes the condemnation of lands for public parks, whether such parks shall be under management of the county, state, or national government. A national park is as much a public park as any other park.

A park is a place of recreation and enjoyment for the public generally. *Humphreys v. City and County of San Francisco*, 92 Cal. App. 69, 75, 268 P. 388; *Archer v. Salinas City*, 93 Cal. 43, 50, 28 P. 839, 16 L. R. A. 145. It makes no difference whether it is designed for the use of the people of a town, city, county, or state, or for the people of the nation. *Wilson v. Lambert*, 168 U. S. 611, 18 S. Ct. 217, 42 L. Ed. 599.

[3] Appellants claim that the court erred in not finding any severance damages. Subdivision 2 of section 1248 of the Code of Civil Procedure provides that if the property sought to be condemned constitutes only a part of a larger parcel, the court must assess the damages that will accrue, by reason of its severance, to the portion not sought to be condemned. The uncontradicted evidence is that the land sought to be condemned is entirely surrounded by land owned by the United States, and that it is not a part of a larger parcel from which it is sought to be severed by this condemnation action. The sole claim for severance damages is that the Copper Mountain Mining Company owns some mining claims in the vicinity of the land sought to be condemned, and that for operating its said mines it is necessary to have the use of water that exists and flows over and across the said land sought to be condemned. There is no showing that the said Copper Mountain Mining Company is the owner of, or has acquired any right to the use of this water. The property for which severance damages are claimed is owned by other than the one whose land was sought to be condemned. Appellants cite no authorities to the effect that severance damages may be awarded to one who is not the owner of the land sought to be condemned, and we have found none that uphold this doctrine.

[4] There is ample evidence to support the finding of the trial court that the value of the land condemned was the sum of \$11,875, and that the value of the leasehold was the sum of \$1,500.

[5] The question as to whether or not a public necessity existed for this park cannot be considered in this action for the reason that section 1241 of the Code of Civil Procedure provides that the resolution shall be conclusive evidence of such

public necessity. In the absence of a showing of fraud, bad faith, or abuse of discretion, the passage of the resolution is conclusive evidence of the public necessity for condemning the land for park purposes. There is no evidence that the board of supervisors was guilty of fraud, or of abuse of discretion, or acted in bad faith in the passage of said resolution. The claim of appellants is that the purpose the board of supervisors had in view in condemning this land was to turn it over to the United States. The evidence does not support this claim. The most that can be said of the evidence bearing on this question is that the board of supervisors expressed a willingness to convey this land to the United States at some time in the future provided the United States was willing to accept it. There was no agreement upon the part of said board that it would so convey the said land, nor any agreement that the United States would accept it.

The judgment is affirmed.



7 Cal.App.2d 14

PEOPLE v. NOGGLE.

Cr. 1430.

District Court of Appeal, Third District,
California.

May 15, 1935.

Rehearing Denied May 29, 1935.

Hearing Denied by Supreme Court

June 13, 1935.

1. Automobiles ☞356

Evidence that motor vehicle department, in revoking operator's license, referred thereto by number, and that such license had been issued after supposed loss of original license, did not show as matter of law that original license remained in effect so as to preclude conviction for driving without license (St. 1923, p. 533, § 70; St. 1929, p. 567, § 74).

2. Automobiles ☞144

Statute providing that motor vehicle department "may" conduct hearing for revocation of operator's license after receiving verified complaint as to mental or physical in-

infirmities held mandatory as regards hearing, in view of fact that department acts quasi-judicially (St. 1923, p. 528, § 50, subd. 1; St. 1929, p. 560, § 73 (b) (1), (c).

[Ed. Note.—For other definitions of "May," see Words & Phrases.]

3. Licenses ⇨38

Generally, quasi-judicial boards possessing sound discretion in passing on facts, as in revoking licenses, may act only after notice and opportunity for licensee to present evidence.

4. Automobiles ⇨144

Motor Vehicle Act giving division chief discretion to set time for hearing on complaint for revocation of operator's license because of mental or physical infirmities held to mean that division may disregard complaint if trivial or stating insufficient facts, since any other construction of term "discretion" would render statute unconstitutionally discriminatory (St. 1929, p. 560, § 73 (b) (1), (c).

5. Statutes ⇨72

All laws must be uniform as applied to individuals of same class.

6. Automobiles ⇨144

That statute gives right to hearing in superior court after denial or revocation of operator's license held not to justify motor vehicle department in revoking license without hearing on charges of mental or physical infirmities (St. 1929, p. 560, § 73 (b) (1), (c); St. 1931, p. 2108, § 64 (h).

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Walter F. Noggle was convicted of driving his automobile without an operator's license after his license had been revoked, and he appeals.

Reversed.

Wetter & Rankin, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted under the provisions of section 74 of the California Vehicle Act (St. 1923, p. 535, as amended by St. 1929, p. 567) of the misdemeanor of driving his automobile without a license therefor, after his permit to do so had been revoked by the department of motor

vehicles without notice to him and without a hearing.

[1] In August, 1929, the defendant was regularly granted an operator's license to drive his automobile, which was numbered 634,428. He was employed by the Pacific Gas & Electric Company at Red Bluff. He lived in the country near by, and used his machine as a necessary incident to his business. For several years he operated his machine. There is no evidence that his qualifications to drive an automobile were ever questioned. In 1934 he misplaced his original license and supposed it had been lost. He applied for another permit, which was promptly issued to him without question, and numbered C203,664. Without previous notice and without a hearing, the defendant was notified by letter by the chief of the division of drivers' licenses and adjustments that:

"You are hereby notified that operator's license #C203664 * * * has been revoked. * * *

"This action was taken as our information indicates that you are subject to spells causing the loss of consciousness and at times you are unable to exercise reasonable and ordinary control over a motor vehicle. * * *

Assuming that he was authorized to operate his machine for the reason that he had not been notified that his original permit had been revoked, the defendant continued to drive his automobile. He was charged by a complaint filed in the superior court of Tehama county and subsequently convicted of driving his automobile after his license had been revoked, contrary to the provisions of section 74 of the California Vehicle Act. From the judgment of conviction which was accordingly rendered, and from the order denying motion for new trial, the defendant has appealed.

As grounds for reversal of the judgment, the appellant contends that the failure of the department of motor vehicles to revoke his original certificate left him with a valid operator's license authorizing him to drive the machine, and that the attempted revocation of the last certificate was ineffectual and void for the reason that he was given no previous notice or hearing of the proceeding.

It was evidently the purpose of the department of motor vehicles to revoke the defendant's permit and license to drive an

automobile. His second certificate was merely issued upon his application as a duplicate of the original permit on the assumption that the last-mentioned certificate had been lost. The operator's license is mere evidence of the permit to drive an automobile. Section 70 of the California Vehicle Act (St. 1923, p. 533) provides that: "In the event that an operator's or chauffeur's license * * * shall be lost or destroyed, the person to whom the same was issued may obtain a duplicate thereof. * * *" The department of motor vehicles attempted to revoke the only certificate of the defendant which it supposed was in existence. It may therefore not be said, as a matter of law, the reference to the last duplicate certificate by number, in an attempt to revoke the permit to drive an automobile, leaves the original one, which was presumed to be lost, in effect. There is no merit in this contention of the appellant.

[2-5] The department of motor vehicles, which is a quasi-judicial department for the purpose of passing upon facts in granting or revoking operators' licenses, was not authorized to revoke the defendant's license to drive his automobile without notice and without a hearing. Fairly construed, the California Vehicle Act contemplates the right of a hearing based upon a verified complaint for the revocation of a driver's license on the ground that the possessor thereof has mental or physical infirmities or disabilities which disqualify him from operating an automobile. A contrary construction of the statute would be in conflict with the established rule of law and good reason requiring all quasi-judicial boards possessing a sound discretion in passing upon facts to act fairly and impartially in so doing after notice and an opportunity has been afforded the licensee to present evidence with relation thereto for the consideration of the board. This rule has been followed with relation to the granting or revoking of liquor licenses. With due appreciation of the dangers attending the driving of motor vehicles, in this progressive age when the necessary use of automobiles is so indispensable and inseparable from legitimate business, it would be unjust and extremely harmful to grant any individual or body the arbitrary right to revoke an operator's license to drive a machine on mere rumor or hearsay evidence without notice and without a hearing. We are in accord with strict reg-

ulations of the department respecting the granting of permission to operate automobiles and in control of the traffic, but this necessity does not dispense with the necessity of exercising a sound discretion based upon uniform and reasonable procedure and competent evidence, nor permit the arbitrary determination of the privilege of driving an automobile without notice or a hearing.

In harmony with this just and wise procedure, we are of the opinion the California Vehicle Act contemplates a hearing based upon a verified complaint for the revocation of an operator's license to drive an automobile on a charge of mental or physical infirmities or disabilities disqualifying the licensee. Section 50 of the California Vehicle Act (St. 1923, p. 528) authorizes the revocation of a license for various reasons enumerated therein. That section is silent regarding the necessity of notice or a hearing thereof. It provides:

"The division may * * * revoke a registration or license provided for in this act in any of the following events:

"First—If the division is satisfied [from competent evidence after a hearing] that the applicant for or the person who has obtained the registration of a vehicle or a chauffeur's or operator's license is not entitled thereto under the provisions of this act."

Section 73 (St. 1923, p. 534 as amended by St. 1929, p. 560) is the only section of that act which purports to provide the method of revoking a driver's license for infirmities or disabilities. This section clearly contemplates the filing of a verified complaint and a hearing. It provides in part:

"(b) The division may conduct an investigation and hearing to determine whether the license of an operator or chauffeur shall be suspended or revoked in any of the following events:

"(1) Upon receiving a verified complaint that any person is afflicted with such mental or physical infirmities or disabilities as would constitute ground for refusal of a license under this act. * * *

"(c) The chief of the division shall determine the sufficiency of any complaint filed hereunder, and in his discretion shall have power to set a time for hearing in the county wherein the person complained of shall reside, and such person shall be en-

titled to at least ten days' previous notice of such hearing from the division. * * *

Supervisors, 135 Cal. App. 96, 26 P.(2d) 843, 845, that:

The preceding section contemplates the revoking of a license only upon a verified complaint after a hearing of the charges. The word "may," as it is used in connection with the conducting of a hearing, should be construed to be mandatory upon the division to conduct a hearing. *County of Los Angeles v. State of California*, 64 Cal. App. 290, 296, 222 P. 153. It is true that subdivision (c) of the last-mentioned section does provide that "The chief of the division shall determine the sufficiency of any complaint filed hereunder, and in his discretion shall have power to set a time for hearing in the county wherein the person complained of shall reside, and such person shall be entitled to at least ten days' previous notice of such hearing. * * *" This discretion on the part of the chief of the division "to set a time for hearing" may reasonably be construed to mean that in the event the complaint fails to state facts warranting an investigation or hearing, or that the charges of the complaint are trivial, the division may disregard the complaint and permit the accused to continue to hold his permit without the necessity of a hearing thereon. Any other construction of the term "discretion" as it is there employed would render the section unconstitutional and void as discriminatory; for it would then give the chief of the division the arbitrary power to deny one licensee a hearing and grant that privilege to others. It is a well-established principle that all laws must be uniform in their application to individuals of the same class. In 37 Corpus Juris, page 240, § 97, it is said in regard to the arbitrary exercise of a quasi-judicial board's power to grant or revoke licenses: "The power vested in the board or officer to grant licenses upon the applicant complying with the prescribed conditions, unless mandatory in terms, carries with it, either expressly or impliedly, the power of exercising, within the limits prescribed by the act or ordinance, a reasonable discretion in granting or refusing licenses. But this discretion must be exercised reasonably, and not arbitrarily, and furthermore arbitrary power in this respect ordinarily cannot be conferred on such board or officer."

With respect to the right of a hearing and the limitation of the discretion of a board of supervisors in granting a liquor license, it was said in *Martin v. Board of*

"When a board of supervisors is charged by law with the duty of issuing licenses upon specified terms and conditions, that tribunal becomes a quasi judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Since a board of supervisors is only a quasi judicial body in its investigation and determination of the merits of petitions for licenses in conformity with the provisions of an ordinance, its hearings may be somewhat informal and need not conform in all respects to the solemnity of a court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for license with an opportunity for the petitioner to present competent evidence for the consideration of the board. *Reed v. Collins*, 5 Cal. App. 494, 90 P. 973; 33 C. J. 548, §§ 138-141. By the great weight of authority, as appears from the text in 33 C. J. at page 548:

"'One who has made an application for license is entitled to a hearing by the licensing authority.' On page 549 of the same volume it is further said:

"'Where the hearing on an application for a license is held before a court, or before a board which acts in a judicial capacity, the proceedings are in the nature of a civil action and are governed by the ordinary rules of judicial procedure applicable thereto.'"

The preceding quoted language is peculiarly applicable to the power of the department of motor vehicles to revoke an operator's license for mental or physical infirmities. If a petitioner for a license to sell intoxicating liquor, for which privilege no vested right exists (*Ritz v. Lightston*, 10 Cal. App. 685, 689, 103 P. 363), is entitled to a hearing upon his application, certainly one who has been granted an operator's license to drive an automobile, which may be a valuable necessary incident to the conducting of a business upon which the livelihood of the accused depends, should be accorded an impartial hearing before his license is arbitrarily revoked. Nor will the urgency of unusual circumstances justify the delegating of arbitrary or discriminatory power to revoke a license without notice and without a hearing.

[6] It is suggested section 64 (h) of the California Vehicle Act (St. 1923, p. 532 as

amended by St. 1931, p. 2108) furnishes the possessor of a driver's license with all the right of hearing to which he is entitled. That subdivision provides in part: "Any person denied a license or whose license has been revoked by the division shall have the right to file an application within thirty days thereafter for a hearing in the matter in the superior court of the State of California, in the county wherein the applicant shall reside. * * *"

This proceeding furnishes nothing more than the right of an appeal from the order of revocation that has already been made. It does not compensate for the injustice of an arbitrary revocation of a license without the hearing contemplated by the statute. 42 Cor. Jur., p. 724, § 186.

In the case of *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 P. 481, it was properly held there was no invasion of the rights of a licensee to revoke his permit to drive an automobile after conviction of reckless driving in a trial duly had under the provisions of section 72 of the California Vehicle Act (St. 1923, p. 534, as amended by St. 1929, p. 559), or for failure to satisfy a judgment for damages for the negligent driving of his machine under the provisions of section 73 (g) of the same act (St. 1923, p. 534, as amended by St. 1929, p. 561). This is because the accused has had his opportunity to be heard at the trial and the revocation of his license follows as an added penalty for the offense of reckless driving of which he has been convicted.

In support of the contention that the department of motor vehicles has the authority to revoke a driver's license without notice and without a hearing, we are cited to only three authorities, which are readily distinguishable from the rule which we have announced. But if these authorities may be deemed to be in conflict with what has been previously said regarding the necessity of notice and a hearing, we are

not in accord with the decisions. In 42 Corpus Juris, page 724, § 186, upon which the respondent relies, it is said: "Where the rights of a motor vehicle licensee are wholly dependent upon the terms of the statute or ordinance under which the license is granted, and there is a provision therein for the revocation of the license, but no requirement of notice or hearing, either expressly or by fair implication, the rights of the licensee may be cut off by revocation without notice or a hearing."

The preceding text is supported by only two authorities upon which the respondent in this case also relies, to wit, *La Plante v. State Board of Public Roads*, 47 R. I. 258, 131 A. 641, and *Burgess v. Mayor and Aldermen of City of Brockton*, 235 Mass. 95, 126 N. E. 456. The last-mentioned cases were determined upon the asserted statements that the statutes authorizing the revoking of a driver's license neither specifically nor by "fair implication" authorized a hearing upon the proceeding to revoke the license. Contrary to that omission of the statutes expressed in these cases, we are of the opinion the California statute does imply and by fair construction thereof specifically provides for the revoking of a license for physical infirmities or disabilities only upon verified complaint and after an impartial hearing, which is in accord with the general rule of law regarding the limitation of discretion on the part of a quasi-judicial board.

It follows that the driver's license of the appellant in this case was illegally revoked without notice and without a hearing; that it still remains in force, and that there is therefore no evidence to support his conviction.

The judgment and the order are reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

**CREST CORPORATION v. COFFEE
PRODUCTS OF AMERICA, Inc.,
Limited.
Civ. 9416.**

**District Court of Appeal, Second District,
Division 2, California.**

May 24, 1935.

**Hearing Denied by Supreme Court
July 23, 1935.**

1. Sales ☞60

In construing orders for merchandise, where contract is not included in one writing but consists of conversations, letters, and memoranda, surrounding facts and circumstances must be considered.

2. Sales ☞8

Statement in one order that coffee-making devices were to be paid for monthly for quantity used each month, and in another order that devices were to be paid for 30 days after disposal, when considered with other evidence held to show that articles were shipped on consignment; hence purchaser was not liable for payment of articles which had not been sold.

3. Appeal and error ☞1010(1)

That there is evidence tending to support a contrary conclusion raises merely an issue of fact whereon decision of trial court is final.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Crest Corporation against the Coffee Products of America, Inc., Limited. From a judgment for defendant, plaintiff appeals.

Affirmed.

Charles E. R. Fulcher and Alfred E. Cate, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appellant was the producer of a device to make coffee by the drip method. Joannes Corporation, a predecessor in interest of respondent and who took part in some of the transactions here involved, was engaged in the preparation and sale of coffee and had worked out a plan to stimulate sales whereby the retail purchasers of its product could secure drip coffee makers without cost. For simplicity Joannes Corporation and its successor will be referred to hereinafter as the respondent. Negotiations between the parties resulted in ap-

pellant, by letter dated August 15, 1928, summarizing the previous oral and written communications and reciting that respondent was to purchase within one year from the receipt of the first shipment a minimum of 30,000 coffee machines, each machine to have inclosed in its carton certain filter sheets for use in the machines. The letter further recites that the net price for each machine is to be 86 cents and that the terms on the first order "are 30 days net from date of withdrawal and any balance on hand January 2, 1929, will be billed to you at that time. On future orders terms will be ten days net from date of withdrawal," deliveries to be in lots of not less than 2,500 each. The letter also referred to the agreement that the covers of the coffee makers were to be embossed with a special inscription including the name of respondent's brand of coffee, and the carton containers, and other included printed matter were to specially refer to respondent and its product. There was also included, along with other matters not necessary for consideration here, a statement of the agreement that within certain territory respondent was to be the only coffee roaster company with whom appellant would contract. In its reply to this letter the sales manager of respondent wrote that they did not remember having agreed to purchase any specific number of the machines or any further quantity than the order given, but otherwise took no exception to the statements in the letter to which it was an answer.

There seems to be no controversy as to the nature of the transactions in which respondent bought coffee makers from appellant under the above agreement, under which the parties dealt for several years. However, early in 1930, appellant of its own initiative advised respondent that there was on hand at the manufacturing plant a quantity of the coffee makers not completely assembled, and offered these machines at a price substantially less than that charged for previous deliveries; and by its written order of March 28, 1930, respondent ordered 1,464 dozen of such articles at 56 cents each, "to be paid for monthly for quantity used each month," and by written order of June 27, 1930, ordered 60 coffee makers "to be paid for 30 days after disposal."

The present action, commenced January 5, 1933, was brought upon the theory that the transactions under the orders of March

28 and June 25 constituted sales of goods to be paid for under the terms stated in the orders, and that a reasonable time having elapsed without effort on the part of respondent to dispose of coffee makers still in its possession, of the value of \$5,065.44, the latter became indebted to appellant in that sum. Respondent contended and the court found that the transactions of March and June, 1930, constituted only a consignment in storage and that respondent was obligated to pay for only such coffee makers as it actually sold. These conflicting contentions present the basic issue raised on this appeal.

[1] In construing the two orders, the contract not being included within one writing but depending upon conversations, letters, and memoranda, the facts and circumstances surrounding them must be taken into consideration. It appeared in evidence that prior to the March order George C. Dorman, a representative of appellant, stated to E. L. Weaver, an officer of respondent, that appellant had a quantity of coffee makers stored at the factory; that he wanted to save storage; that he asked Weaver to buy them and that Weaver said he could not use them and would not buy them. Dorman then asked Weaver if respondent would take them in storage and sell them, to which proposition, after several further conversations, Weaver agreed. Without any written order a large quantity of coffee makers was then sent by appellant to respondent, which, on receipt of the invoice, wrote to Dorman calling attention to the fact that there had been no order sent and stating the understanding that the coffee makers were to be taken in storage, to be invoiced every thirty days and payment made for the number used. To this letter Dorman replied conceding negligence in not first securing a requisition before making the shipment and stating that in the absence of a requisition respondent had been billed on the assumption that the terms were the same as on the previous shipment. This letter did not in any manner express any disagreement with the recital in respondent's letter as to the understanding regarding the shipment. The letter also requested a confirming order on the shipment, and respondent then sent what is referred to in the record as the order of March 28, 1930. Mr. Dorman testified that the shipment covered by the June 25, 1930, order was taken on the same

terms as the previous order, a fact further supported by the circumstance that the last order and shipment were for the last of the machines remaining at the factory. There were received in evidence three invoices covering the coffee makers shipped in March, 1930, sent by appellant to respondent, which contained the recital that the merchandise had been shipped "on consignment," and appellant's bookkeeper testified that she had sent a dozen similar statements.

[2, 3] The evidence herein recited, even without other matters of record to the same effect omitted here as not necessary to our conclusion, supports the decision of the trial court that as to the coffee makers covered by the orders of March and June, 1930, the transactions amounted only to shipments on consignment, and that respondent was under no obligation to pay for such articles as had not actually been sold. The fact that there is evidence tending to support a contrary conclusion raises merely an issue of fact as to which the decision of the trial court is final.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



6 Cal.App.2d 665

SINGER et al. v. BRIGGS.

Civ. 1706.

District Court of Appeal, Fourth District,
California.

May 8, 1935.

1. Deeds ⚡56(1)

Statute providing that all of decedent's entries, repeated in regular course of business, one being copied from another at or near time of transaction, are regarded as originals, is inapplicable to deeds, carbon copies of which cannot be considered as originals (Code Civ. Proc. § 1947).

2. Appeal and error ⚡173(2)

Defendant's claim, not set up in answer or made in trial court, but first raised on appeal from judgment canceling deed to her, that carbon copy of deed must be considered as original in determining whether deed was

delivered to her during grantor's lifetime, need not be considered.

3. Deeds ⇨208(1)

Evidence in action to cancel deed held sufficient to support court's finding that deed was never delivered to defendant by grantor during his lifetime.

Defendant testified that she received deed from friend of grantor after latter's death, but that grantor gave her carbon copy of deed and stated that it was "real original deed," that house on lot conveyed was defendant's, if she stuck with him and kept house for him, and that original recorded deed, introduced in evidence by her, was deed of which copy was set forth in answer, but there was no evidence that carbon copy was properly executed as deed, such copy was not produced or offered in evidence, and there was no evidence justifying court in treating it as original deed.

4. Pleading ⇨182

Plaintiffs in action to cancel decedent's deed to defendant did not admit delivery thereof during grantor's lifetime by failure to file affidavit denying delivery after defendant filed answer containing copy of deed, where complaint alleged that deed was never delivered; further denial of such fact being vain and useless (Code Civ. Proc. § 448).

5. Deeds ⇨200

Court held justified in accepting evidence controverting prima facie showing or presumption from face of deed sought to be canceled that it was duly executed and delivered to defendant during grantor's lifetime.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Hannah Singer, an incompetent person, by John W. Singer, guardian of her person and estate, and John W. Singer, as administrator with the will annexed of the estate of Joseph Singer, also known as Joe Singer, deceased, against Minnie Briggs, who filed a cross-complaint. Judgment for plaintiffs, and defendant appeals.

Affirmed.

N. B. Nelson, of Los Angeles, for appellant.

Gabriel C. Duque, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to cancel a deed and to quiet title to a certain lot in Los Angeles

county. Among other things, the complaint alleges that Hannah Singer and Joseph Singer were married in 1891; that they acquired the lot in question as their community property; that on November 18, 1926, Joseph Singer, without the consent of Hannah Singer and without consideration, executed a grant deed purporting to convey the property to the defendant; that this deed was acknowledged March 5, 1927, and recorded March 24, 1932; that this deed was never delivered by the said Joseph Singer; that he died on April 8, 1931; and that the defendant did not come into possession of the deed until after March 1, 1932, when she received it from one Vern Dumas, a friend and associate of Joseph Singer. In her answer the defendant admits that she received said deed from Vern Dumas on or about March 14, 1932, and sets forth a copy of the deed, including the time and place it was recorded, as the basis of her claim to the property. In a cross-complaint she asked to have her title quieted in and to an undivided one-half interest in the property.

At the trial it was stipulated that the property involved was the community property of the incompetent plaintiff and her husband; that the defendant did not receive the deed in question until on or about March 15, 1932; and that Hannah Singer has been incompetent since about 1913. Certain testimony was then taken, after which the court made findings in all respects in favor of the plaintiffs, finding, among other things, that the deed in question had never been delivered by Joseph Singer. Judgment was entered canceling the deed and quieting title in the plaintiffs, and the defendant has appealed.

[1-3] The only point raised is that the evidence is not sufficient to support the finding that this deed was not delivered within the lifetime of Joseph Singer. The evidence is exceedingly meager. The appellant, called as a witness for the respondents under section 2055 of the Code of Civil Procedure, testified that she received this deed some time in March, 1932; that she had kept house for Joseph Singer since 1918 and had cared for him through one spell of sickness; that at some time, probably a couple of months after the date of the deed, Joseph Singer gave her "a carbon copy of the deed"; that he then said: "That is the real original deed"; and further, "He said if I stuck with him and kept

house for him that that house was mine; that I would never be sorry for what I had done for him." She further testified that Mr. Singer told her at the time he gave her the carbon copy that she was to have the original if she stuck by him. She also testified that she received a letter from Mr. Dumas when he forwarded the deed to her. Her attorney was asked for this letter, but replied: "I don't care to show it." The appellant introduced in evidence the original deed as recorded, stating to the court that this was the deed a copy of which was set forth in the answer.

The appellant now maintains that this evidence shows that a deed was delivered to her, because it appears therefrom that the deed was executed in duplicate and the carbon copy thereof must be considered as an original, under section 1947 of the Code of Civil Procedure. That section has no application to such an instrument as a deed. Moreover, such a claim was not set up in the answer, was not made in the trial court, and is here raised for the first time. Aside from other considerations, there is no evidence that the carbon copy was properly executed as a deed, the same was not produced or offered in evidence, and there was no evidence which would have justified the court in treating it as an original deed. The only evidence indicates that Singer did not intend to deliver the deed to the appellant until some time in the future, and then only upon a certain condition. The evidence is sufficient to support the court's finding on the only issue presented.

[4, 5] Some contention is made that the delivery of the deed in question was admitted by the pleadings and that the finding of nondelivery is outside of the issues. This is based upon the contention that the appellant set up a copy of the deed in her answer and that the respondents admitted the delivery thereof by failing to file an affidavit in accordance with the provisions of section 448 of the Code of Civil Procedure. It is therefore argued that under such cases as *Thomas v. Fursman*, 177 Cal. 550, 171 P. 301, a prima facie showing of due delivery was made. This Code section and such cases as that referred to have no application here. The complaint alleged the execution of the deed with a complete description thereof, including the time and place of recording, and then alleged that it had never been delivered. An issue as to this

was raised by the answer and the case was tried upon that issue. A further denial of the fact of delivery would have been a vain and useless thing. *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509. There was other evidence to controvert any prima facie showing or any presumption of due execution and delivery which might appear from the face of the deed and the court was justified in accepting such other evidence. *Cox v. Schnerr*, supra. It fully appears that the original deed was not delivered until after the death of Joseph Singer and the appellant has entirely failed to produce any proof with respect to the delivery of a claimed duplicate thereof which could affect the situation.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 183

WALTON v. CARLY et al.

Civ. 5304.

District Court of Appeal, Third District,
California.

May 24, 1935.

As Modified June 10, 1935.

1. Brokers ☞4

Where vendor intrusted broker with revolving fund to be reinvested in good first mortgages, entire transaction would be considered in determining whether broker's obligations were violated so as to render surety on broker's statutory bond liable to vendor (Gen. Laws 1931, Act 112).

2. Brokers ☞4

Where broker purchased land and vendor left purchase money with broker in revolving fund to be reinvested by broker in good first mortgages, broker to charge commission for each reinvestment, and broker knowingly invested money in second mortgage and vendor was compelled to pay \$825 to have land redeemed from first mortgage, surety on broker's bond was liable to vendor for \$825 so paid, where it was not shown that vendor held security sufficient to cover original loan and subsequent payment of \$825 (Gen. Laws 1931, Act 112, §§ 2, 9a).

3. Brokers ⇨4

Where broker purchased land and vendor left purchase money with broker in revolving fund to be reinvested by broker in good first mortgages, broker to charge commission for each reinvestment, and broker misappropriated repayment of loan collected for vendor, surety on broker's bond was liable to vendor for amount misappropriated by broker (Gen. Laws 1931, Act 112, §§ 2, 9a).

4. Brokers ⇨4

Where penalty on real estate broker's bond was allowed for breach of obligation, interest was allowable only from time of demand, and not from date of misappropriation (Gen. Laws 1931, Act 112).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by Hattie S. Walton against J. C. Carly, Commercial Casualty Insurance Company, and others. From a judgment for plaintiff, last-named defendant appeals.

Modified, and as modified, affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

Ralph H. Lewis, of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The Commercial Casualty Insurance Company, a corporation, has appealed from a judgment which was rendered against it in a suit on two surety bonds which were executed to secure the faithful services of the J. C. Carly Company and the Carly Investment Company, as real estate brokers.

In 1928 and 1929, the appellant, an insurance corporation, executed as surety, two bonds for the sum of \$2,000 each, for the faithful performance of the J. C. Carly Company and the Carly Investment Company, as real estate brokers, under the provisions of the California Real Estate Act for the licensing and regulation of brokers. St. 1919, p. 1252, and amendments thereof, Act 112, 1 Deering's Gen. Laws of 1931, p. 25. J. C. Carly had been engaged in the real estate business in Sacramento since 1890. He was the manager and chief stockholder of both of the realty firms which are involved in this suit. The J. C. Carly Company was incorporated in 1910. The Carly Investment Company was incorporated in September, 1929. These companies co-oper-

ated in the operation of their real estate business. The J. C. Carly Company purchased from the plaintiff in 1910 "Curtis Oaks" subdivision of the city of Sacramento for \$50,000, which was paid in installments. Nearly all of this purchase money was left with the J. C. Carly Company in what was termed a "revolving fund" with instructions to invest and reinvest it in "good first mortgage loans." Mrs. Walton testified that she had known Mr. Carly for many years and that she had full confidence in his honesty, judgment, and ability. She said: "I dealt with Mr. Carly as representative of the company. * * * The moneys were loaned, as they were paid in they were reloaned." For several years the Carly Company handled this fund in that manner, making numerous loans therefrom on real estate securities, collecting the principal and interest when due and crediting them to the plaintiff's account on its books, and reinvesting the money when there were funds on hand. Sometimes the investments were mere book transactions of the renewal of existing mortgages. The real estate company charged the plaintiff commissions for each of these transactions. At first the plaintiff approved the various investments. Later she spent her time traveling abroad and she left these investments to the judgment of Mr. Carly, as a representative of the company in whom she had absolute confidence. Certain installments of principal and interest were remitted to her from time to time. Much of this fund remained in the custody of the J. C. Carly Company to be handled in the manner stated.

After purchasing the Curtis Oaks property from the plaintiff, the J. C. Carly Company organized another company, called the South Curtis Oaks Company, of which J. C. Carly was also the manager and chief stockholder. This property was conveyed to the last-mentioned holding company, and on March 31, 1928, it was reconveyed by trust deed to the California Trust & Savings Bank to secure a loan of \$66,000. In September, 1928, lot No. 127 of this mortgaged tract was sold to R. H. and Katie Febick, in part payment for which they executed a trust deed to the South Curtis Oaks Company to secure their promissory note of \$4,400. This lot was not then released from the \$66,000 mortgage on the entire tract held by the California Trust & Savings Bank.

With full knowledge of this prior mortgage on the part of the officers of the J. C. Carly Company, the Febick note and trust deed were transferred to the plaintiff in consideration of the face value thereof on March 22, 1929, contrary to her instructions to invest her money only in "good first mortgages." The plaintiff had no knowledge of that irregular transaction. The South Curtis Oaks Company failed to pay its \$66,000 note when it became due, and foreclosure of the mortgage on the entire tract of land, including the Febick lot, was threatened. The plaintiff then for the first time learned that \$4,400 of her money had been invested by the J. C. Carly Company, contrary to her instructions, in a second mortgage loan on the Febick lot. The plaintiff was compelled to, and on April 25, 1932, did, pay the California Trust & Savings Bank the sum of \$825 to release that property from their first deed of trust, and to thus convert her Febick loan into a first mortgage security.

In March, 1925, the J. C. Carly Company, pursuant to its former agreement with the plaintiff, invested \$2,400 of her money in a loan to E. S. and Florence M. Turpen, secured by a trust deed on their lot No. 375 of "Homeland" subdivision of Sacramento. That loan was subsequently paid to the Carly Investment Company, without the plaintiff's knowledge, on April 26, 1930, and then appropriated to the use of the company. No part of the last-mentioned sum of money was ever paid to the plaintiff or credited to her account, but on the contrary it was appropriated by the Carly Investment Company.

The record contains many other transactions in which funds of the plaintiff were invested and reinvested by the Carly realty corporations for the plaintiff, which are not necessary to consider on this appeal. Subsequently the J. C. Carly Company and the Carly Investment Company failed, and were unable to meet their obligations.

This suit was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff on all essential issues. Judgment for \$2,850 and interest thereon was rendered against all of the defendants jointly. The Commercial Casualty Insurance Company, only, has appealed from that judgment.

As grounds for reversal of the judgment the appellant contends that the findings, to the effect that the Febick loan of \$4,400

and the misappropriation of the \$2,400 which was paid on the Turpen loan constituted violations of the employment of the Carly companies as real estate brokers, are not supported by the evidence; that the plaintiff was not damaged by the payment of the additional sum of \$825 to release the Febick property from the first mortgage lien of the California Trust & Savings Bank for the reason that her security was ample to cover the original loan and the subsequent payment. It is also asserted that interest was erroneously allowed on the amount of the judgment from the date of the alleged misappropriation of funds, for the reason that no previous demand was made upon the surety company for reimbursement.

Considering the entire transaction by means of which the Carly companies were intrusted with a "revolving fund" belonging to the plaintiff, to be used for investment and reinvestment in "good first mortgage securities," we are of the opinion the two irregular transactions, for which the plaintiff was awarded damages in this action, constitute violations of the obligations of the companies as real estate brokers and render the sureties liable on their bonds.

A "real estate broker" is defined in the California Real Estate Act above referred to as "a person, copartnership or corporation who, for a compensation, sells or offers for sale * * * real estate, or *who, for compensation, negotiates loans on real estate.* * * *" Section 2.

The statute pursuant to which the bonds in this case were executed requires that they be "conditioned for the honest and faithful performance by such broker and his salesmen and employees of any undertaking as a licensed real estate broker * * * at any time when licensed under this act, and the strict compliance with the provisions of this act, *and the honest and faithful application of all funds received.* Said bonds shall be further conditioned upon the payment of all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of this act, or by reason of the violation of the obligation of such broker as an agent as such obligations are laid down by the Civil Code of the state of California, or *by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act.*" Section 9a.

[1] The entire transaction, in which the plaintiff intrusted the Carly real estate

firms with a "revolving fund" to be invested and reinvested for her in "good first mortgage securities," must be considered in determining whether the obligations of the companies, as brokers, were violated under the provisions of the California Real Estate Act. *Democa v. Barasch*, 212 Cal. 293, 298 P. 17, 19. In the case last cited, a surety company was held to be liable on its broker's bond for the embezzlement of funds by a real estate agent which were paid to him incident to the transfer of a lease. The court said in that regard: "Having undertaken the exchange of said lease, with other incidental duties, the entire transaction must be viewed as a whole and regarded as coming within the act and the terms of the bond. The embezzlement of the above-mentioned sum by said defendant, therefore, constituted a breach of his obligation as a real estate broker within the terms of the act, fixing liability upon defendant surety under the terms of said bond." *Clark v. Patterson*, 213 Cal. 4, 300 P. 967, 75 A. L. R. 1124; *Muller v. John J. Davi & Bro.*, 131 Cal. App. 156, 21 P.(2d) 121.

[2] When the J. C. Carly Company invested the plaintiff's money in the \$4,400 note and second deed of trust on the Fe-bick lot, knowing that it had previously executed a deed of trust on the entire "Curtis Oaks" tract of land, including the lot in question, to secure a \$66,000 loan from the California Trust & Savings Bank, the Carly Company violated its obligation to loan the plaintiff's money only on "first mortgage securities." This was certainly a breach of its obligation as a real estate broker to "honestly and faithfully" *negotiate loans on real estate*. For a broker to accept a client's money for the express purpose of negotiating a loan on first mortgage security, and then appropriate the money to his own use without security, is certainly a breach of his obligation as a real estate broker. To the extent of the \$825, which the plaintiff was compelled to pay the bank to release the lot from its prior mortgage lien and give to her a good first mortgage to secure her loan, she was damaged by the conduct of her agent, and to that extent she is entitled to recover in that transaction upon the bond of her agent's surety.

Nor may it be reasonably or equitably said that she was not damaged by that transaction because she held a trust deed on the property which will be deemed to

furnish her ample security to also cover the added sum of \$825 which she was compelled to pay. There is no evidence to indicate that she held security sufficient to cover the original loan and the subsequent payment of \$825, or that the terms of the trust deed cover the last-mentioned sum.

[3] So, also, it was a violation of the obligations of the Carly Investment Company to appropriate to its own use the Turpen loan of \$2,400 which was paid to that company to be reinvested for the plaintiff. That was a clear violation of the provision of the statute which requires a broker to make an "honest and faithful application of all funds received" for investment in real estate securities.

[4] It is properly conceded the court erroneously allowed interest on the amount of the judgment rendered against the surety company on account of the misappropriation of the Turpen loan of \$2,400, for the reason that it appears no previous demand for the return of this money was made by the plaintiff until the commencement of this action. The court said in the case of *Democa v. Barasch*, 212 Cal. 293, 298 P. 17, 19, in that regard: "The court allowed interest at the legal rate from the date of the defalcation. Inasmuch as the full penalty of the bond is decreed, interest should not begin until after demand." *Trumpler v. Cotton*, 109 Cal. 250, 256, 257, 41 P. 1033. The filing of the original complaint is the only definite date the record fixes as the time of such demand."

There appears to be nothing in the case of *Schomig v. Keiser*, 189 Cal. 596, 209 P. 550, 551, or *Kelly v. Ward* (D. C. Cal.) 2 F. Supp. 37, upon which the appellant relies, in conflict with what we have heretofore said regarding the facts of this case. In the *Schomig Case*, which was a petition for a writ of certiorari to review the action of the real estate commissioner in revoking a broker's license, the court said: "There is no charge in the complaint, and no evidence to prove the charge if it were in the complaint, that Schomig was employed for a *compensation* to do the acts complained of, or that the acts themselves constituted a part of a contract for the sale of real estate."

The transaction complained of in that case was the appropriation of rent which was collected independently of the broker's contract to procure a sale of real property. In the present case there is no

question that the realty companies were paid commissions for each investment of the plaintiff's money according to agreement, and that they secured the money which was misappropriated only for the purpose of investment and reinvestment in good first mortgage securities. The present case is clearly distinguishable from the Schomig Case in that regard.

In the case of *Kelly v. Ward*, supra, upon which the appellant also relies, the United States District Court held that a surety bond was not liable for the defalcations of a broker who had been separately employed by a client to make collections of certain loans. The court said: "Plaintiff employed Ward to make collections on these loans." It is then stated: "These collections were not made by Ward in his capacity of real estate broker but in his capacity of agent and trustee of plaintiff." In the present case, however, the plaintiff's money was left with the Carly companies to be invested and reinvested in first mortgage securities. But if the *Kelly v. Ward* Case be deemed to be in conflict with what we have previously said regarding the violation of the Carly companies' obligations as real estate brokers, then we are not in accord with that decision.

The judgment is modified by striking therefrom the provision for interest to be computed prior to the time of filing of the complaint in this action, which was September 14, 1932. As so modified, the judgment is affirmed, respondent to recover costs on appeal.

I concur: PULLEN, P. J.



7 Cal.App.2d 52

MITCHELL v. ALPHA HARDWARE &
SUPPLY CO. et al.

Civ. 5315.

District Court of Appeal, Third District,
California.

May 17, 1935.

1. Execution ⇨222(3)

Execution sale of real estate was not rendered invalid by reference in notice of sale

to "Nevada" instead of "Sierra county" wherein property was situated, where it did not appear that notice misled purchasers, or prevented fair and honest sale of property, or that sale was fraudulently made (Code Civ. Proc. §§ 694, 695).

2. Sheriffs and constables ⇨120

Execution sale of property as one parcel did not render sale invalid so as to render sheriff liable in collateral proceeding, notwithstanding property consisted of three parcels, where property was operated and known as one property, and debtor did not request sale of property in separate parcels, and there was no showing that larger sum could have been realized had property been sold in parcels (Code Civ. Proc. §§ 694, 695).

3. Execution ⇨258

Objection that property was sold as one parcel instead of several parcels should have been raised on motion to set aside sale, and not by collateral attack on sale (Code Civ. Proc. §§ 694, 695).

4. Execution ⇨326

Sale upon prior executions extinguishes lien of junior judgments, whereas sale on junior judgment leaves property subject to prior judgment, liens, and executions, hence rule as to distribution of proceeds when sale is made under junior execution has no application where sale is made under prior execution (Code Civ. Proc. §§ 694, 695).

5. Execution ⇨326

When sale is made under prior execution, junior lienholders can look only to proceeds remaining after first judgment has been satisfied, but when sale is made under junior judgment, prior lienholders may still have recourse against property (Code Civ. Proc. §§ 694, 695).

6. Execution ⇨233

Statutory requirement that purchaser at execution sale pay bid in cash does not exclude manner of payment which substantially amounts to payment in cash (Code Civ. Proc. §§ 694, 695).

7. Execution ⇨326

A sale under a junior lien leaves property subject to prior liens, while a sale under a prior lien extinguishes all junior liens and proceeds should be distributed by sheriff in satisfaction of other executions in his hands, according to priorities thereof (Code Civ. Proc. §§ 694, 695).

8. Execution ⇨323

Where priorities of subsequent liens are disputed, money obtained under execution sale should be paid into court, to be distributed upon order of court, according to rights of

parties as determined by court (Code Civ. Proc. §§ 694, 695).

9. Execution ⇨323

Execution sale made under a prior lien releases property from subsequent liens, and rights of subsequent lienholders attach only to proceeds after judgment held by prior lienholder has been fully satisfied (Code Civ. Proc. §§ 694, 695).

10. Sheriffs and constables ⇨120

Where judgment creditor holding assignments from all other judgment creditors purchased property at execution sale for amount of liens, purchaser's failure to pay sheriff cash purchase price did not invalidate sale so as to render sheriff liable in collateral proceeding, where executions held by sheriff were settled by purchaser giving receipts for judgments after payment of costs, as against contention that purchase money in excess of purchaser's judgment should have been paid to sheriff in cash (Code Civ. Proc. §§ 694, 695).

11. Execution ⇨258

Collateral attack on execution sale on ground that property was sold in one parcel instead of in separate parcels, after expiration of redemption period, came too late (Code Civ. Proc. §§ 694, 695).

Appeal from Superior Court, Sierra County; J. B. Landis, Judge.

Action by M. C. Mitchell against Alpha Hardware & Supply Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Sherman & Peters, of San Francisco, for appellant.

W. E. Wright, of San Francisco, and Lynn Kelly, of Grass Valley, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff, in his complaint, sets forth a number of causes of action. They involve the validity of a sheriff's sale of certain real property known as the "Ruby Mines," situate in Sierra county, and couples therewith a count asking for the return of between \$3,500 and \$4,000 alleged to be the excessive amount which the plaintiff was compelled to pay in order to secure a redemption of the property from the sale thereof made by the sheriff.

The record shows that preceding the sale of the property five judgments had been obtained against the Ruby Mining Company, and executions thereon issued and placed in the hands of the sheriff of Sierra county. Of these executions the one based upon the judgment obtained by the Alpha Hardware & Supply Company appears to have had priority, and was for the sum of \$2,119.15, which, with the costs added, amounted to the sum of \$2,776.97.

At the sale of the mining property the Alpha Hardware & Supply Company bid the sum of \$6,478.42, being the aggregate amount due upon all five of the judgments, on which judgments executions had been placed in the hands of the sheriff, as we have just stated. No money was actually paid to the sheriff, save and except his costs. The four judgments other than those based upon the indebtedness to the Alpha Hardware & Supply Company had been, previous to the sale, assigned by the respective judgment holders to the Alpha Hardware & Supply Company. Following the sale, instead of cash in the amount of the bid being paid over to the sheriff, his costs were advanced, and then receipts given for the amount of the respective judgments which, as we have said, equalled the bid. Thereupon, satisfactions of the five judgments were entered, and after the expiration of the time for redemption, a deed to the property sold under execution was delivered to the defendant Alpha Hardware & Supply Company.

The plaintiff in this action, some time after the sale, succeeded to the title of the Ruby Mining Company to the mining property involved in this action, and even though the time for redemption had expired, obtained from the defendant Alpha Hardware & Supply Company an extension of time within which to make redemption, and thereafter did tender and pay to the Alpha Hardware & Supply Company for the redemption of the mining properties the sum of \$7,338.22. This sum included costs, interest, and penalties as provided by law.

A number of technical objections to the sale and to the proceeding are advanced by the appellant, to wit: That the notice of sale is misleading; that the property owned by the Ruby Mining Company was sold en masse instead of being sold in separate properties; that the money in excess of the

judgment obtained by the Alpha Hardware & Supply Company, amounting to \$3,701.-45, should have been paid over in cash.

There is some testimony in the record that one of the attorneys for the Alpha Hardware & Supply Company, after the sale, stated to the sheriff that he was prepared to pay over the amount of the bid. However, no cash appears to have been tendered, nor was any check for the amount of the bid actually presented to the sheriff. The payment of the bid was made in the manner which we have hereinbefore stated.

[1] We find no allegation in the complaint and no testimony in the record indicating any fraud in the sale conducted by the sheriff, nor do we find anything in the record indicating that the amount of the bid was not adequate, or that the properties were not sold for all that they were reasonably worth. Neither is there anything in the complaint or in the record indicating that any errors made by the sheriff in his notice of sale misled any purchasers, or prevented a fair and honest sale of the properties. The notice indicating the properties to be sold referred to the judgment, and in some part of the notice mentioned Nevada instead of Sierra county. There being nothing in the record and nothing in the complaint indicating that the notice was misleading, prejudicial, or injurious, we think the rule set forth in the case of *Frink v. Roe*, 70 Cal. 296, 11 P. 820, 822, applicable, to wit: "A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale."

[2,3] The record shows that the executions were all in the hands of the sheriff, subject to inspection by any intending purchaser, and that a transcript of the judgment under which the property was sold was recorded in the office of the county recorder of Sierra county, and had been of record for a number of months prior to the sale. The record shows that the property sold had been operated as one property, and while it consisted of three parcels, it appears to have been only known as one property. No request was made by the debtor company to have the property sold in separate parcels, and having been used as one property, and known as one property, and there being nothing in the complaint nor anything in the testimony showing that an increased sum could have been had for the properties if sold separately, we think the contention that the sale is invalid by reason

of the properties having been sold en masse untenable. This view is supported by the case of *Rauer v. Hertweck*, 175 Cal. 278, 165 P. 946, and other cases which might be cited. Furthermore, as stated in the case of *Colver v. W. B. Scarborough Co.*, 73 Cal. App. 441, 238 P. 1104, 1105, this objection should have been raised by motion to set aside the sale. In the case just cited, we find the following: "At the outset it may be stated as a general rule supported by many authorities that a proceeding to set aside a sale under execution, excepting where some special facts are alleged which may create jurisdiction in a court of equity, the proper procedure is by motion to vacate the sale in the action under which it is claimed any irregularities occurred. 23 Cor. Jur. 682 et seq.; *Boles v. Johnston*, 23 Cal. 226, 83 Am. Dec. 111; *Ketchum v. Crippen*, 37 Cal. 223; *Browne v. Ferrea*, 51 Cal. 552; *Craig v. Stansbury*, 37 Cal. App. 668, 174 P. 404, where the authorities are reviewed; *Morris v. Winans*, 30 Cal. App. 575, 159 P. 213."

The principal ground of objection urged by the appellant is based upon the fact that no actual cash passed from the bidder at the sheriff's sale to the sheriff, but that the respective executions in the sheriff's hands were settled by the giving of receipts and the satisfactions of judgments. A number of cases are cited, such as *People ex rel. Kohler v. Hays*, 5 Cal. 66, 67; *Askew v. Ebberts et al.*, 22 Cal. 263; *Maina v. Elliott*, 51 Cal. 8, and others, to the effect that the purchaser is not entitled to a deed unless he has paid to the sheriff a sum of money equal to the amount of his bid. These cases are readily distinguishable from the case at bar. Applied to the case at bar, the purchaser would not have been entitled to a certificate of sale, and after the time for redemption had expired, to a deed to the property sold, unless there had been passed by the purchaser to the sheriff the amount of the bid, or, as we shall show by subsequent citations, that which in substance amounted to a payment of the sum bid.

Principal reliance is placed by the appellant, first, upon the case of *Meherin v. Saunders*, 131 Cal. 681, 63 P. 1084, 54 L. R. A. 272. An examination of this case reveals that the only question involved was the liability of the purchaser by reason of having stopped payment upon a check given in payment of the amount of his bid, in addition to the costs which were paid to the sheriff in cash. This statement shows that

it is not authority for the determination of any question presented upon this appeal.

[4, 5] The second case cited as supporting the plaintiff's contention that reversal should be had because no actual money passed from the purchaser to the sheriff is that of *Woods v. Kellerman*, 3 Cal. App. 422, 89 P. 358. The following excerpt from that opinion furnishes the basis for the appellant's contention, to wit: Where there are several executions against the same property in the hands of the sheriff, any sale made by the sheriff, though under junior execution, is not a sale upon all the executions; and the money is not to be credited on the several liens in the order of their priority. Without questioning the correctness of this quotation as a rule of law, it does not hold that where a sale is made by a sheriff upon the first execution placed in his hands, the proceeds derived from the sale may not by the sheriff be applied toward satisfying the junior executions based upon judgments against the same defendant, which executions were in the hands of the sheriff prior to the sale. The sale upon the prior executions extinguishes the lien of junior judgments and executions, whereas a sale on a junior judgment and execution leaves the property subject to the prior judgments, liens, and executions. Thus, the principle as to the distribution of the proceeds when the sale is made under a junior execution has no application where the sale is made under a prior execution. When the sale is made under the prior execution, the junior lienholders can only look to the proceeds after the first judgment has been satisfied, whereas, when the sale is made under a junior judgment and execution, prior lienholders may still have recourse against the property.

While section 694, Code of Civil Procedure, setting forth the procedure governing sales, does not require, in so many words, that sale shall be for cash, section 695 of the same Code does specify that if a purchaser refuses to pay the amount of the bid made by him, the officer may again proceed with a subsequent sale, and that if any loss is suffered thereby, the first bidder who refuses to pay may be held liable.

[6] Accepting the appellant's contention that the statute contemplates that payment should be made in cash, this does not exclude a manner of payment which substantially amounts to the same thing. Nor does

the statute require any idle ceremony. In the case of *Moore v. Martin*, 38 Cal. 428, we find the following, touching the giving of receipts instead of payment in cash: "Had he purchased in his own name, and had the Sheriff so understood it, he would have been required to pay not the costs, but the bid, which he did not pay, but receipted for on the back of the execution." (This relates to the plaintiff's attorney.) "It would be a very strange proceeding for the purchaser, who is not the judgment creditor, to receipt on the back of the execution for the amount of his bid, instead of paying it to the Sheriff. By such a proceeding, the judgment creditor would hardly come into the proceeds of the sale. But where the property is bid off by the plaintiff in the execution, or by his attorney for him, the universal practice is to receipt for the amount of the bid, less the costs, upon the back of the execution, and pay the Sheriff his costs only. To pay money to the Sheriff merely to have it returned would be an idle ceremony. This return on the execution must be read by the light of this practice, and when so read, we think its meaning is not doubtful." (The return on the execution showed satisfaction thereof.)

[7] In section 196, *Freeman on Executions*, vol. 2 (3d Ed.), we find the following: "The purchaser at the sale under the junior lien acquires a title which may be divested by a subsequent sale under an elder lien." This relates to mortgages. Under executions based upon judgments, we find the following: "With sales made under execution, the rule is different. If a sheriff has two or more writs in his hands, it is his duty to apply the proceeds to the writ having the elder lien. He may, however, levy and sell under the junior writ. If he does so, the purchaser acquires title to the property sold, free from the lien of all the other writs. In such an event, the plaintiff under whose junior writ the levy and sale were made is not entitled to the proceeds of the sale. On the contrary, it is the duty of the sheriff to apply these proceeds to the several writs that may be in his hands, according to their priority as liens. A sale, when made by the officer, is not for the benefit of the particular writ under which it is made, but for the benefit of all writs in his hands, according to their respective priorities." This rule as to priorities differs from the rule adopted in this state, but substantially follows what we think is the proper rule with regard to the

disposition of proceeds, to wit: A sale under a junior lien leaves the property subject to prior liens, while a sale under a prior lien extinguishes all the junior liens, and under the rules set forth in "Freeman on Executions," the proceeds should be distributed by the sheriff in satisfaction of other executions in his hands, according to the priorities thereof.

[8] It seems to be the rule, also, that if there is any dispute concerning the subsequent liens, the money should be paid into court, to be distributed upon the order of the court, according to the rights of the parties as the court should determine. In the instant case there appears no contention as to priorities, as the purchaser at the execution sale was the owner by assignment of the four other judgments and executions referred to herein.

[9] There seems to be a difference, also, in the application of the rule concerning the effect of sales under prior and junior executions. In a number of states it is held that a sale under a junior execution relieves the property from all prior liens, and that the proceeds of the sale should be applied to the settlement of the prior liens. On the other hand, the majority of the jurisdictions hold to the rule that it is only a sale under a prior lien which relieves the property from the lien of junior executions. The right to the proceeds, however, appears to be just as we have stated. We quote from *Freeman on Executions*, § 338, vol. 3, 3d Ed., as follows: "In some states a sale of property under executions has in most cases the effect of transferring title regardless both of junior and of senior liens against the property. The claim of the lienholders is released from the property, and attached to its proceeds in the hands of the officer." As the rule is applied in this state, it has the effect, when a sale is made under a prior lien, of releasing the property from the subsequent liens, and the rights of subsequent lienholders attach only to the proceeds after the judgment held by the prior lienholder has been fully satisfied.

In 23 C. J., p. 649, the procedure followed in *Moore v. Martin*, *supra*, is approved. It is there said: "In some jurisdictions where the judgment-creditor becomes a purchaser at the execution sale, the officer should, at the direction of such judgment, credit the amount of his debt upon the execution if the costs of the sale are paid, but

not where he refuses to make a payment at least sufficient to cover the costs, although the sale is not rendered incomplete by the fact that the officer failed to pay over the costs to the clerk of the court. If the bid exceeds the amount due, he must pay the excess. Where there are other liens on the property of equal dignity with the lien of the judgment-creditor, the officer may require him to pay over the purchase money in order that he may deposit the same in court to await a judicial decision as to the distribution thereof." And further: "Where the purchaser is a mortgagee whose mortgage has priority over the execution, he may retain the amount of his debt. If the judgment is prior to the mortgage, the purchaser may apply his mortgage on the amount of his bid in excess of the execution debt. Under some statutes lien creditors may pay by giving a receipt."

[10] In the instant case the defendant was not only a lien creditor, by reason of the assignment of the different judgments, but was also the holder of all the executions issued on the different judgments, and entitled to receive payment thereof, and under the authorities which we have cited, and what we have stated, entitled to receive from the sheriff payment out of the proceeds of the sale of the property to the extent of the several judgments. This enforces again the rule that it would have been only an idle gesture to pay the actual money over to the sheriff of Sierra county, and then have the sheriff immediately return the money to the Alpha Hardware & Supply Company.

In addition to the authorities cited supporting the procedure approved in the foregoing, we may call attention to the notes following the case of *Gillespie v. Keating*, 57 Am. St. Rep. 622-625; 11 Cal. Jur., p. 81, § 34.

In *Kelly v. Barnet*, 24 Cal. App. 119, 140 P. 605, it is held that while a judgment creditor who bids in property at an execution sale for the amount of his judgment, as a matter of convenience may arrange with the officer making the sale to have the latter accept his receipt for the amount of the judgment in lieu of cash, the sheriff is not required to do so. Thus, approving the rule that if the sheriff accepts the receipt, and the judgment is satisfied, in substance and effect it amounts to the same thing as though actual cash had been passed to and

fro, from purchaser to sheriff, and sheriff to purchaser.

[11] We may also call attention to the case of Gregory v. Bovier, 77 Cal. 121, 19 P. 232, which holds that after the period of redemption has expired it is too late to attack the sale on the ground that the property was sold en masse instead of in separate parcels.

Finding no substantial errors in the record, it follows that the judgment must be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



6 Cal.App.2d 611

HACKLEY v. SOUTHERN PAC. CO.
Civ. 5281.

District Court of Appeal, Third District,
California.

May 6, 1935.

Rehearing Denied June 5, 1935.

Hearing Denied by Supreme Court
July 5, 1935.

1. Evidence ⇨244(15)

Testimony as to defendant railroad company's division superintendent's statement to plaintiff and another several weeks after death of brakeman, falling through open trapdoor in rear platform of superintendent's business car attached to rear of train, that superintendent left trap open, *held* inadmissible as admission of negligence rendering company liable in administratrix' action for damages (Federal Employers' Liability Act, 45 USCA §§ 51-59).

2. Witnesses ⇨379(2)

Testimony as to defendant railroad company's division superintendent's statement to plaintiff and another several weeks after death of brakeman, falling through open trapdoor in rear platform of superintendent's business car attached to rear of train, that superintendent left trap open, *held* admissible to impeach superintendent's testimony that he closed trap before accident in administratrix' action for brakeman's death (Federal Employers' Liability Act, 45 USCA §§ 51-59).

3. Master and servant ⇨204(1)

Rear brakeman on passenger train, to rear of which division superintendent's busi-

ness car was attached to enable him to inspect line, did not assume risk of fall through open trapdoor on rear platform of such car after going there for sole purpose of opening steam line and signaling engineer that such duty was performed; superintendent not being "passenger" to whom brakeman owed duty under railroad company's rule to see that all traps were closed while train was moving (Federal Employers' Liability Act, 45 USCA §§ 51-59).

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

4. Master and servant ⇨265(14)

Employee, for whose death action is brought under Federal Employers' Liability Act, will not be presumed to have been negligent or knowingly incurred risk or injury causing death (Federal Employers' Liability Act, § 3, 45 USCA § 53).

5. Master and servant ⇨228(1)

Contributory negligence constitutes no defense to action under Federal Employers' Liability Act (Federal Employers' Liability Act, 45 USCA §§ 51-59).

6. Master and servant ⇨278(1)

Direct proof is unnecessary to show corporate employer's negligence causing employee's death in action under Federal Employers' Liability Act to recover damages therefor; circumstantial evidence, justifying inference of negligent act by officer or another employee of corporation being sufficient (Federal Employers' Liability Act, 45 USCA §§ 51-59).

7. Evidence ⇨89

Inferences and presumptions from circumstances surrounding event are not necessarily destroyed by opposing testimony, but remain for consideration by trial court and jury in reaching conclusion.

8. Master and servant ⇨228(1)

Railroad brakeman, going on rear platform of division superintendent's business car, attached to rear of passenger train, for sole purpose of opening steam line valve and advising engineer thereof by means of signal cord above trapdoor negligently left open by superintendent or another employee of railroad company, *held* not negligent in failing to see open trap, though he carried lighted lantern (Federal Employers' Liability Act, 45 USCA §§ 51-59).

9. Master and servant ⇨265(6)

Res ipsa loquitur doctrine *held* applicable in action under Federal Employers' Liability Act for death of railroad brakeman, falling through open trapdoor in rear platform of business car attached to rear of passenger train for exclusive use of division su-

perintendent in inspecting line, where complaint pleaded negligence generally, as well as specifically (Federal Employers' Liability Act, 45 USCA §§ 51-59).

10. Negligence ⇨121(2)

Complaint pleading negligence generally, as well as specifically, lays foundation for application of *res ipsa loquitur* doctrine.

Appeal from Superior Court, Sacramento to County; Peter J. Shields, Judge.

Action by Edna C. Hackley, as administratrix of the estate of Lewis R. Hackley, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Devlin & Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellant.

Sheridan Downey, of Sacramento, and Clifton Hildebrand and Werner, Martin & Hildebrand, all of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This appeal is by the defendant from a judgment obtained in an action prosecuted by the plaintiff under the provisions of the Federal Employers' Liability Act (45 USCA §§ 51-59) to recover damages on account of the death of the husband of the plaintiff, alleged to have been caused by the negligence of the defendant. The plaintiff's intestate came to his death by falling from the rear platform of the last car of train No. 22, on the morning of the 18th of February, 1932. The train in question was being operated on the lines of the Southern Pacific Railway Company running from Oakland, Cal., to Ogden, Utah, by way of Sacramento, Cal., and Reno, Nev. The accident, by means of which the plaintiff's intestate met his death, occurred on the line of the railway operated by the defendant a short distance west of the town of Reno. There were no eyewitnesses to the accident, and the judgment of the trial court appears to have been based upon the circumstantial testimony and the inferences drawn from the circumstances and conditions surrounding the incident which led to the death of Lewis R. Hackley.

The rear platform of the car from which the decedent fell was situate on a private

or business car used by W. L. Hack, the superintendent of the Sacramento division of the Southern Pacific Company. This car was attached to the rear of train No. 22 at Sacramento in order to permit the superintendent to make an inspection of the roadbed from Sacramento to the end of the Sacramento division, which terminated at a point about 5.8 miles west of Reno. The rear platform of this car has a metal railing entirely around it. The sides of the platform were equipped with steps over which there was, and is, the usual car floor-traps and the usual metal gates, so that when the traps are down and the gates are closed the rear platform is entirely surrounded by protecting gates and metal railing, and when the traps are down the entire platform is usable from gate to gate. The traps are raised, and the gates are opened by two separate movements or actions. When the trap is raised it is fastened, by a ratchet, to the end of the car, and then the gate swings back against the raised trap.

On the morning of February 18, 1932, as was his custom, Lewis R. Hackley, who had for many years been a brakeman employed by the defendant, and then was employed in that capacity on train No. 22, went to the rear platform of the superintendent's car for the purpose of opening a stop valve in order to allow steam to escape from the heat line on the train. This appears to be for the purpose of allowing moisture to be blown therefrom in order to prevent condensation in the line, and freezing, as the train proceeds at such high altitudes. After opening the valve and allowing the steam to escape, Hackley disappeared. After opening the valve, it was the practice of the brakeman to step to the opposite side of the platform, and by means of a signal cord, signal the engineer as to the fact of the valve having been opened. This action required Hackley to step to that portion of the rear platform, where the trapdoor was subsequently found open, the theory of the plaintiff being that after opening the valve, which is slightly to the opposite side of the center of the platform, Hackley stepped over to reach the signal cord and signal the engineer, and instead of succeeding in doing so, dropped through the open trapdoor and fell to his death.

The record shows that at the time of the incident which we have mentioned, the superintendent was sitting in the rear of the car, saw Hackley go through the rear door

carrying a white lantern, and thereupon Mr. Hack left the car in which he had been sitting, stepped to another portion of the car to obtain an overcoat, and upon returning noticed that the rear platform was enveloped in steam, and upon going to the door, observed that Hackley had disappeared. Mr. Hack then gave a stop signal to the engineer who, apparently thinking that it was the signal that should have been given by Mr. Hackley, paid no attention thereto, whereupon Mr. Hack applied the air brakes and stopped the train. The train was backed up some distance, and Mr. Hackley's dead body was found lying on the ground. The accident occurred at approximately 5:50 a. m.

As we read the record, we think the trial court was justified in concluding that, after the train left Truckee, no person other than Hackley went out upon the rear platform, and that Hackley went out on the rear platform of the rear car only once, and that was at the time when he met his death.

While there does not appear to be any testimony in the record that either trap or gate of the rear platform was opened after the train left Truckee, it does appear that one of the traps and one of the gates was opened while the train was standing at Truckee, one of the stations on the main line. The testimony of Mr. Hack is to the effect that upon reaching Truckee a conductor of the line operated by the company from Truckee to Tahoe City came into the car to give Mr. Hack some information relative to snow conditions on the Tahoe line. While this conference was being had, one of the cars on train No. 22 was cut out and switched from the main line to a siding called the "house track." The language of the witness is as follows: "The Tahoe engine came against us on the rear end and took off the car 'Sacramento', ('Sacramento' is the name of the business car used by superintendent Hack), and some other cars, and set a car out on the 'house track', and came back again against the train on the main line. At sometime between the time the Tahoe engine coupled on, and the switching movement was completed, Joe Roderick came in and I discussed with Joe the snow conditions on the Tahoe branch. We talked about rotaries and flangers and other things that railroad men talk about. I think when we got back on the train Joe was still in the car, if I remember right. After we got about ready to go * * * Roderick got off. Hackley was at the

rear platform on the ground. When the steam valve was opened on the rear end of the car 'Sacramento', the steam didn't immediately come through, and I said to Hackley, 'Don't start the train until the steam comes through this car'. That happened at Truckee, * * * and when the steam came through we were ready to go. * * *

"Q. Well, now, was the trap-door open at that time? A. I can't answer whether it was right at that time or not; I don't know whether I closed it or not, but Hackley was on the ground.

"Q. I understand. And where was Mr. Roderick? A. He was off the car then, standing on the ground.

"Q. Was that just before you pulled out from Truckee towards Reno? A. Yes, sure it was; * * * whether Roderick was walked away or not, I don't know.

"Q. Did you close the trap-door and the gate? A. You didn't ask me that question.

"Q. Yes, I did. A. No, you asked me how he could close the steam from the ground, and I said he did.

"Q. All right, I am asking you. A. All right. Now, after Mr. Brakeman gets through and the steam comes through, whether he went up ahead, or right or left side facing west, I don't know, I couldn't—

"Q. Now, wait a minute, I will get down to that. I am trying to show you he didn't get on the platform and go through the car. A. Whether he went right or left, I couldn't say, but I went in the car. The trap on the right side, to my knowledge, never had been opened; the trap on the left side was kicked down to a joining, and the gate was closed by myself.

"Q. You remember that very distinctly? A. Sure, I do, very distinctly.

"Q. Anything that occurred at that time to impress it on your mind? A. Only the shock after Hackley fell off, running it through my mind, what happened, because that is what I was out there for, to see the steam came through and everything was all right when we left Truckee.

"Q. Was Hackley there when you closed the trap-door and the gate? A. He was there at the rear. He started up one side or the other.

"Q. Was Roderick there? A. I can't say that; whether Joe walked off or was standing there, I couldn't say, because my conversation was with Hackley.

"Q. Do you mean to say you have made no inquiry of Roderick as to whether he saw you close that gate? A. No sir, none at all; never have spoken to Mr. Roderick about this occasion since the night we discussed the snow conditions on the branch.

"Q. Now, Mr. Hack, what was your customary practice about closing that gate and trap-door under similar conditions? A. When I am back in the car alone at night?

"Q. Yes. A. I always close it, Mr. Downey.

"Q. You never leave it open? A. No. I don't leave it open, I close it."

[1] In connection with the testimony which we have just quoted and its bearing upon its accuracy or credibility as to whether either one of the traps or gates on the rear platform of the superintendent's car was left open by Mr. Hack, we may call attention to an alleged statement made by Mr. Hack to the plaintiff and a witness by the name of Essex, in which Mr. Hack is alleged to have stated that he left one of the trapdoors open, and which statement Mr. Hack denied any recollection of having made. The testimony of Mr. Essex is as follows:

"Mr. Essex, I will ask you whether or not at that time you heard Mr. Hack say in substance that he supposed Mr. Hackley had fallen out—

"Mr. Wulff: If your Honor please, I see no reason why this witness should be led. Mr. Downey is reading a statement. This witness, if he knows, he knows.

"The Court: I think he is giving independent evidence, is he not? I think you better ask him if he had a conversation, and what was said.

"Mr. Downey: I thought, your Honor, it was our duty to ask if he did hear the statement which Mr. Hack denied that he made, but if your Honor—

"The Court: But that would make the evidence—you see, that would be impeaching Mr. Hack. You want this as independent evidence?

"Mr. Downey: Well, opposing counsel does, and that is satisfactory to us.

"Mr. Downey: Now, will you tell us what, if anything, was said by Mr. Hack in reference to the trap-door being opened
* * *

"Mr. Essex: * * * I understood Mr. Hack to say it was open so that he could

get off at Reno to obtain a paper, a morning paper."

The plaintiff's testimony is in substance to the same effect, only differing in that the plaintiff testified that they went to the office of Mr. Hack in Sacramento. Notwithstanding that this interview took place a number of weeks after the death of Mr. Hackley, it is contended by the respondent that Mr. Hack's statement to the plaintiff and Mr. Essex may be considered by this court as an admission of negligence on his part, fixing liability upon the defendant. This position taken by the respondent we think erroneous. While there are cases supporting the declaration that the admission of an agent may be considered in fixing liability upon a principal, those cases, however, disclose that the admission held as charging the principal's liability must have been made in the course of the business or transaction, out of, and as a part of, the transaction upon which the action is based. We quote from section 733 of volume 2, p. 716, Fletcher's Cyclopaedia of Corporations, as follows: "Declarations or admissions of an officer or agent of a corporation are not binding upon it, nor admissible in evidence against it for any purpose, unless they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his authority, or unless they were expressly authorized by the corporation, or have since been ratified by it. However, the declarations of an officer of the corporation, although not admissible as an incident of the litigated act, may be admissible on other grounds if the officer had authority to speak for the corporation. So statements may be admissible to contradict a witness although not admissible to bind the corporation. On the other hand, declarations, or admissions of officers or agents are admissible in evidence against the corporation for any purpose for which, and under the same circumstances under which, declarations or admissions of a natural person are admissible against him, if they were expressly authorized by the corporation or its authorized officers, or if they have been ratified, or if, although neither expressly authorized nor ratified, they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his general authority. 'While corporations can only speak through agents, nevertheless, the cor-

poration is bound by the declaration of an agent precisely as a natural person would be bound, that is, by the declaration of its agent made while acting within the scope of the agent's authority to act and as a part of some authorized transaction with third persons.'"

[2] The rule just stated relative to declarations and admissions are supported by an overwhelming list of authorities in footnotes accompanying the text which we have just quoted. In the instant case, assuming that the declarations and admissions relative to leaving the trapdoor open were made by Mr. Hack, just as testified to by the plaintiff and Mr. Essex, such declarations cannot be considered as admissions of the defendant, or as fixing any liability upon the defendant. The testimony of the plaintiff and also of Mr. Essex may be considered, however, and were proper to be considered by the trial court as impeachment testimony affecting the statement of Mr. Hack that he closed the gate and trapdoor on the rear platform, after his admission that the same had been opened at the town of Truckee.

[3] Rule 851, governing the conduct of train employees, is to the effect that trapdoors and gates shall always be kept closed while the train is in motion, and as a protection to passengers, we think the appellant's contention is correct that it is the duty of brakemen to see that all traps and doors are closed while the train is in motion. The business car attached to the rear of train No. 22 on February 18, 1932, cannot be considered as a passenger car. It was attached thereto for the purpose of enabling the superintendent to inspect the line of railway by means of floodlights affixed to the rear of the car.

So far as the record discloses, Hackley's mission in coming through the car was for the purpose of opening the steam line in order that any moisture that had been collected therein might be blown out before the train reached Reno.

The testimony shows that in alighting from the train it was the brakeman's duty and practice to alight from a car in advance of the business car occupied by the superintendent of the division, and when the brakeman came through the car to open the steam line, he carried only a white lantern, and not a red lantern and red flag, which constitutes his equipment when alighting from the train when it

stops, and acting as a rear guard therefor. Hackley was not going to the rear end of the business car, as we read the record, for any other purpose, while he might, when he suspected anything was wrong with the running gear of the car, properly go to the rear thereof for the purpose of making the inspection, there is nothing in the record to indicate that Hackley had any such purpose, from which the trial court we think was justified in concluding that Hackley went there for the single purpose of opening the steam line, allowing the moisture to be blown therefrom, and then to step to the opposite side of the platform, and by means of the signal line convey to the engineer that he had attended to such duty.

Hack's admission, as we have stated, could only be considered by the trial court as affecting the accuracy and credibility of his testimony, and could be considered by the trial court for the purpose of determining whether Hack's testimony that he had closed the gate and the trap was a correct statement of the facts.

Assuming, for the purpose of argument, that the trapdoor was left open by Mr. Hack, the appellant contends that Hackley, as the rear brakeman on train No. 22, assumed the risk thereof, and that it was his duty to ascertain the condition of the trap and door, and that if he fell through the same without discovering the condition in which they were subsequently found, he alone was and is responsible. As we have said, the rule requiring the keeping of traps and doors closed was a rule having for its purpose the protection of passengers. Mr. Hack was traveling in a business car for a business purpose as the superintendent of the Sacramento division. The contention of the appellant that he was a passenger we think untenable.

Section 1 of the Federal Employers' Liability Act (45 USCA § 51, p. 92), after specifying who may maintain actions on account of injury or death of an employee, reads: "For such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

We think the circumstances in this case, which we have set forth, show that there was no assumption of risk on the part of

Hackley as to the condition of the trapdoor and gate on the rear of the superintendent's car. As bearing upon the question of assumption of risk and showing that it does not apply, we quote from the case of *San Pedro, L. A. & S. L. R. Co. v. Brown* (C. C. A.) 258 F. 806, 809, 8 A. L. R. 865, 869: "Clearly, under the act, the defense of assumption of risk is open to the carrier, except in actions brought under section 4, which provides that, in an action for damages for injury to an employee, 'such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475 [8 N. C. C. A. 834]. But Brown was not injured by reason of any defect in the machinery, or by reason of any danger normally or necessarily incident to the occupation of inspecting cars. The accident would not have happened at all, but for the negligence of a fellow servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the negligence of his fellow servant. *Watson v. St. Louis, I. M. & S. R. Co. (C. C.)* 169 F. [942] 950. In *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 38 S. Ct. 139, 62 L. Ed. 385, the court affirmed the action of the trial court in refusing to charge that 'the risk the employee now assumes, since the passage of the federal Employers' Liability Act [45 USCA §§ 51-59], is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees.'" See, also, *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U. S. 491, 50 S. Ct. 182, 74 L. Ed. 566; *Alpha Steamship Corp. v. Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086. We also quote from the syllabus in the case of *Reed v. Director General of Railroads*, 258 U. S. 92, 42 S. Ct. 191, 66 L. Ed. 480, as follows: "The doctrine of assumption of risk, though not wholly abolished by the Federal Employers' Liability Act [45 USCA §§ 51-59], has no application where the negligence of a fellow servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury."

[4, 5] Section 3 of the Federal Employers' Liability Act (45 USCA § 53) reads in part as follows: "Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Following the language of this section, it has been held that where there is no direct evidence as to how the accident occurred, it will be presumed that the deceased exercised ordinary care. *Burtch v. Wabash R. Co. (Mo. Sup.)* 236 S. W. 338; *Perrin v. Union Pacific R. Co.*, 59 Utah, 1, 201 P. 405. And further, it will not be presumed that the deceased employee was negligent, or knowingly incurred the risk or injury causing his death. *Mappin v. Atchison, T. & S. F. R. Co.*, 198 Cal. 733, 247 P. 911, 49 L. R. A. 1330, certiorari to the U. S. Supreme Court denied. 273 U. S. 729, 47 S. Ct. 239, 71 L. Ed. 862. Contributory negligence under the Federal Employers' Liability Act does not constitute a defense. *Hines, Director General of Railroads v. Sweeney*, 28 Wyo. 57, 201 P. 165.

[6] We do not need to cite authorities to the effect that direct proof is not required to show a negligent act which leads to an employee's death. If such negligent act is established by circumstantial evidence, and if the circumstantial evidence justifies an inference of a negligent act upon an officer or another employee of the company, the finding of the court or jury will not be disturbed. We will, however, call attention to the following cases: *Line v. Erie R. Co. (C. C. A.)* 62 F.(2d) 657; *Mulligan v. Atlantic Coast Line R. Co.*, 104 S. C. 173, 88 S. E. 445; *Hurley v. Illinois Central R. Co.*, 133 Minn. 101, 157 N. W. 1005.

[7] Inferences and presumptions which may be drawn from circumstances surrounding any event under consideration are not necessarily destroyed by opposing testimony, but remain to be considered by the trial court and jury in reaching a conclusion. This court, in the case of *Beers v. California State Life Ins. Co.*, 87 Cal. App. 440, 262 P. 380, in an opinion written by Mr. Justice Hart, considered very fully the subject of presumptions and inferences, and the fact that they remain in the case for consideration by the trial court, as well as testimony which may tend to overcome either an inference or a presumption. Oth-

er cases might be cited supporting the same rule as set forth in the Beers Case, *supra*, but to do so would only unnecessarily lengthen this opinion.

[8] The appellant's contention, based upon the testimony of Hack, that Hackley, with a lighted lantern, should have seen the open trap if the trap were open, does not appeal to us as convincing. Repeating what we have said before, Hackley went out on the rear platform for a specific purpose. That purpose was to open a valve to the steam line, and in doing so he had to reach down a short distance to one side from the center of the rear platform to accomplish such purpose. It then became his duty to communicate with the engineer by means of the signal cord. This cord was near the roof of the car, projecting over the platform and to the opposite side of the platform from the location of the steam valve. After opening the steam valve, Hackley's thought as well as his eye and one of his hands were directed to the signal cord, and not to the trapdoor, which should have been flush with the platform floor. With this purpose in view, and having in mind the use of the mechanical contrivance for communicating with the engineer, Hackley stepped toward that portion of the platform necessary for him so to do in order to reach the signal cord. He placed one foot at least where the trapdoor should have been, and Hackley's time had come. After securing his overcoat, Hack returned to the rear of the car; he observed the platform enveloped in steam. He knew that Hackley had not re-entered the car. As a railroad man he immediately sensed danger, stepped out on the rear platform and observed that Hackley was gone. At the same instant he discovered that one of the trapdoors was open. Whether this was a discovery or a realization on the part of Hack, we do not need to affirm. The trial court found that the deceased, Hackley, did not open the trapdoor. This finding is amply supported by the inferences which the trial court could properly draw from the circumstances and testimony set forth herein. Hackley did not assume, as we have shown, any additional risks occasioned by the negligence of an officer or other employee of the defendant. That there was such negligence need not be shown by direct testimony. We quote from the syllabus in the case of *Rocha v. Payne*, Director General of Railroads, 108 Neb. 246, 187 N. W. 804, as follows: "Negligence is a question of fact and may be

proved by circumstantial evidence. All that the law requires is, that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of."

The facts and circumstances involved in the instant case are readily distinguishable from those involved in the case of *Northwestern Pacific R. Co. v. Bobo*, 290 U. S. 499, 54 S. Ct. 263, 78 L. Ed. 462. In the *Bobo* Case the deceased had been employed as a bridge tender at a point called Grand View on the line of the petitioner's railroad. His duties were to uncouple and couple the tracks, and then mount a short stairway to a room situate in a small house or building on the top of the bridge, for the purpose of operating the mechanism there located, in opening and closing the bridge, and to set the semaphore signals. While engaged in this duty, or while about the bridge, it was alleged that he slipped upon the steps leading to the building at the top of the bridge, and was precipitated into the waters of Petaluma creek. His body was found floating in the water a short distance from the bridge. There does not appear to be any testimony as to the exact manner in which Bobo was precipitated into the water. The metal steps on the stairway, while apparently smooth, had been used by the deceased for a number of months. At the foot of the stairway, on the edge of an iron platform, were found small pieces of wood and a little spot that looked like blood. During the nighttime dew often accumulated on the steps, which of course would cause them to become somewhat slippery. There was no testimony showing any change in the conditions of the mechanism, stairway, railing, or any of the appliances or safeguards with which the deceased Bobo must have been familiar. All of the conditions were held to have been known to Bobo by reason of his months of experience.

While relied upon by the appellant in this case as showing grounds for reversal, the mere recital of the facts involved in the *Bobo* Case reveal the absence of any foundation for inferences or conclusions of negligence. In the present case the conditions and circumstances show a change in the appliances, made without the knowledge of the deceased, and made at a place, and at a time not reasonably to have been anticipated by him. For many months, running into years, the deceased had been accustomed to go upon the rear platform of

the rear car and open the steam valve, just as he did in this case, and then step to the opposite side of the platform, resting his body upon the closed trapdoor while reaching up and grasping the signal cord in order to communicate with the engineer.

We do not deem it necessary to review other cases cited by the appellant where the facts are similar to those set forth in the Bobo Case, and are wanting as a basis from which negligence of the company might be inferred.

[9, 10] If the testimony of the witness, Hack, be taken at its face value, we think that the doctrine of *res ipsa loquitur* applies. The business car, "Sacramento," was under the control and management of the superintendent of the Sacramento division of the defendant's railroad. It was not a passenger car, but a business car, intended for, and, so far as the record shows, confined to the exclusive use of the superintendent. In the instant case the complaint, just as in the case of *McComas v. Al. G. Barnes Shows Co.*, 215 Cal. 685, 12 P.(2d) 630, 635, pleaded negligence generally as well as specifically. This lays the foundation for the application of the doctrine which we have just mentioned. We quote from the opinion in the Barnes Case, as follows: "It is settled, we think, beyond question in this state that the doctrine of *res ipsa loquitur* applies when negligence is pleaded both generally and specially. *Roberts v. Sierra R. R. Co.*, 14 Cal. App. 180, 111 P. 519, 527; *Bourguignon v. Peninsular R. R. Co.*, 40 Cal. App. 689, 181 P. 669; *Burke v. Dillingham*, 84 Cal. App. 736, 258 P. 627; *Seney v. Pickwick Stages Co.*, 82 Cal. App. 226, 255 P. 279."

The same principle is further elaborated in the case of *Lejeune v. General Petroleum Corp.*, 128 Cal. App. 404, 18 P.(2d) 429, 433, where the court adopts the language of 1 *Sherman & Redfield on Negligence*, to wit: "'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.'" *O'Connor v. Mennie*, 169 Cal. 217, 223, 146 P. 674; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 538, 91 P. 481; *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 561, 55 P. 324; *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 P.

1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; *Dixon v. Pluns*, 98 Cal. 384, 388, 33 P. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698. Of course, to justify the application of this doctrine in any case the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * * One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of *res ipsa loquitur*, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's *prima facie* case."

It is conceded that the mere opening of the trapdoor is not in and of itself a dangerous operation.

In addition to what we have said, the accident is shown to have occurred shortly after 5 o'clock on a cold winter morning and at an hour when full daylight had not yet come.

We may further call attention to the language in the case of *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.(2d) 557, 560, 92 A. L. R. 641, where it is said: "And the requirement that the instrumentality be under the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time the negligence was committed. 45 C. J., § 781, p. 1216. In *Van Horn v. Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 148 P. 951, 953, an owner who had employed a contractor to install certain machinery in his building, agreed to lay and connect steam pipes therewith. He was notified by the contractor to cap a steam pipe located close to where a machine was being put in and did so, but, while a workman was engaged at his labors near by, the cap blew off and he was scalded. The owner contended the doctrine of *res ipsa loquitur* did not apply because many persons other than his own employees had access to that part of the premises, and some of them might have struck or tampered with the pipe, causing the cap to loosen. The California Case held otherwise, saying: 'The rule * * *

to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the right of such control; otherwise * * * the doctrine of *res ipsa loquitur* could seldom if ever be given application.' This decision is referred to approvingly in a recent California case. *Wright v. So. Counties Gas Co.* (1929) 102 Cal. App. 656, 283 P. 823, 827."

In the case of *Connor v. Atchison, T. & S. F. R. Co.*, 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462, and other cases cited by the appellant where the doctrine of *res ipsa loquitur* was held not to apply, it appears from an inspection that negligence was alleged specifically only, and not generally, and, therefore, such cases are inapplicable.

Finding no cause for reversal, the judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

Beardsley, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is an appeal upon a proceeding in mandamus tried in superior court. Petitioner appeals after an adverse decision.

Petitioner was for several years an employed official in the harbor department of the city of Los Angeles. During his service he took no vacation for several years, notwithstanding he was entitled thereto under the following provision of the city charter: "Sec. 426. Every person who shall have been in the service of the city, continuously, for one year, shall be allowed a vacation of two weeks on full pay, annually." Upon his leaving the service, and after having been paid his salary in full, he claimed additional payment for the untaken vacation periods under a harbor board resolution which seems to provide that an employee may accumulate allowable vacations over an unlimited period of years and upon leaving the service get additional pay therefor. His service without vacations was voluntary and not under any city official or other request.

The official was employed under a fixed salary, and there is no charter or other legal provision for a double payment for any part of his services, and the resolution of the board was of no effect in such circumstances. Petitioner accepted his position under the provision that he should be allowed two weeks' annual vacation with pay. "Vacation," in this sense, means on the one hand a beneficent surcease from regular duty for two weeks each year, that a period of freedom, rest or diversion for the employee may be enjoyed, and upon the other a gain to the employer through a recuperated and better satisfied employee. Accumulation of vacation would entirely negative such purposes. Had the charter intended to award a faithful employee by providing a bonus for continued uninterrupted service it would have so provided. Such provision would effect exactly the opposite result to the charter's purpose, as we see it. The untaken vacations were waived, and no obligation fell upon the city.

The judgment is affirmed.

We concur: CRAIL, J.; FRICKE, Justice pro tem.

7 Cal.App.2d 290

NICHOLSON v. AMAR et al.
Civ. 10294.

District Court of Appeal, Second District,
Division 2, California.
May 31, 1935.

Hearing Denied by Supreme Court
July 30, 1935.

Municipal corporations ☞208

City harbor department official, voluntarily serving without two weeks' annual vacations, to which he was entitled under city charter provision, waived them and was not entitled to pay in addition to his fixed salary for untaken vacation periods on leaving service under harbor board's resolution.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Proceeding by George F. Nicholson for a writ of mandamus to E. J. Amar and others. From a judgment denying the writ, petitioner appeals.

Affirmed.

Jerrell Babb, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and John

3 Cal.2d 357

SHOUSE v. QUINLEY.

S. F. 15064.

Supreme Court of California.

April 25, 1935.

1. Constitutional law ☞154(1)

As respects impairment, time and method of payment are material parts of obligations of contract (Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

2. Constitutional law ☞143

Waters and water courses ☞216

Amendment to Irrigation District Act permitting landowners holding defaulted matured bonds or interest coupons to apply them in payment of assessments, *held* unconstitutional impairment of obligation of contract giving bondholders right to payment in order of presentation, by preferring landowning bondholders (Gen. Laws 1931, Act 3854, § 52a, as added by St. 1933, p. 532; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

3. Constitutional law ☞143

Amendment to Irrigation District Act permitting landowners holding defaulted matured bonds or interest coupons to apply them to payment of assessments, *held* not valid as emergency measure in view of absence of declared legislative intent to that effect, and of Legislature's failure to limit its operation to exigency and fact that amendment in effect is preferential and that relief attempted to be extended is not cognate to historic exercise of equitable jurisdiction (Gen. Laws 1931, Act 3854, § 52a, as added by St. 1933, p. 532; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

In Bank.

Proceeding in mandamus by E. C. Shouse against C. W. Quinley, as Collector of the Waterford Irrigation District.

Peremptory writ denied.

For prior opinion, see 37 P.(2d) 89.

Hankins & Hankins, of San Francisco, and A. L. Cowell, of Stockton, for petitioner.

Thomas C. Boone and Griffin & Boone, all of Modesto, for respondent.

F. G. Athearn, Milton T. Farmer, Walter Hoffman, and Louis Bartlett, all of San Francisco, amici curiæ.

THOMPSON, Justice.

We granted a rehearing in this case in order to give further consideration to the problem involved, particularly in connection with the cases of County of Los Angeles v. Rockhold (Cal. Sup.) 44 P.(2d) 340, and Islais Co., Ltd., v. Matheson (Cal. Sup.) 45 P.(2d) 326, 330, 332, 333. Upon further consideration, however, we are satisfied with the correctness of the former opinion [37 P.(2d) 89], which is as follows:

This is a proceeding in mandamus to compel the collector of the Waterford irrigation district to accept a credit memorandum, issued by the treasurer of the district in return for surrendered matured interest coupons on the bonds of the district, in payment of the second installment of the 1932 assessment on petitioner's land in the district, to the extent that the assessment was levied to meet bond principal and bond interest.

The amount of the tender was admitted to be as authorized by section 52a of the California Irrigation District Act (St. 1897, p. 254, as amended, Deering's Gen. Laws 1931, Act 3854, vol. 2, p. 1948 et seq.), added by amendment in 1933 (St. 1933, p. 532), but was refused by the collector on the grounds that:

(1) Section 52a is unconstitutional.

(2) If valid, the tender was insufficient in that it attempted to pay by a credit memorandum of bond interest coupons the portion of the assessment levied for bond principal as well as that for bond interest.

(3) The interest coupons represented by the credit tendered were not the first coupons registered and therefore cannot be accepted till all prior registered coupons are paid.

The questioned section provides that, notwithstanding any other provisions of the act, "any owner of land within the

district who is the holder of any matured bond or interest coupon issued by the district, which bond or interest coupon remains unpaid by reason of insufficiency of money * * * is authorized to apply the credit represented by such unpaid bond or coupon as a medium of exchange in the payment of assessments levied against the lands of such person in the manner hereinafter specified.

"Upon presentation and surrender to the treasurer of the district of such matured bonds or interest coupons, or both, the treasurer shall issue to the holder a memorandum in writing, in duplicate, indicating the amount of credit represented by such bonds or coupons, or both, to which such holder is entitled to apply on such assessments.

"The collector shall accept the credit memorandum in lieu of lawful money for that portion of the total assessment levied on the lands of the holder of such bonds or coupons equivalent to the amount of such assessment as was levied to pay the interest and maturing principal of the bonds of the district, together with penalties, interest and costs in case of delinquency. The balance of the assessment shall be paid in money. * * *

"The treasurer of the district shall accept such credit memoranda, to the extent that the same have been applied upon such assessment, as the equivalent of money. The treasurer shall thereupon cancel the bonds and coupons for which such credit was given if the entire amount of the credit memoranda has been applied to the payment of assessments and in the event that only a portion of the credit has been applied, then the treasurer shall indorse upon the face of such bond or coupon the fact that the same has been paid in part to the extent of the credit so applied. * * *

The respondent asserts that the section is in violation of section 16 of article 1 of the state Constitution and section 10 of article 1 of the Federal Constitution. The former provides, among other things, that no "law impairing the obligations of contracts shall ever be passed," and the latter that no state shall pass a law, impairing the obligation of contracts.

For our purposes it is sufficient to note that in 1919 and prior thereto the district had issued and sold the bonds which give rise to this controversy. Prior to the demand by petitioner upon the collector, the

district had made default in the payment of both principal and interest and matured bonds and interest coupons had been presented and registered for payment in the order of their presentation. It is not contended by petitioner that he is entitled to payment as being prior in time of presentation, but he stands upon the letter of the law which permits the landowner, who is the holder of any matured bond or interest coupon, to pay his assessment (excepting the portion thereof assessed for maintenance) therewith. He does not dispute the proposition that there exists a contract between the district and the bondholder and that the provisions authorizing the bonds and providing for their payment at the time of their issuance constitute terms of the contract, but he says section 52a does not substantially postpone, obstruct, or retard the enforcement of rights of the bondholder or lessen the value of his holdings.

At the time of the issuance of the bonds, the act provided that they should be paid from revenue derived from an annual assessment on the lands of the district (section 33 [Deering's Gen. Laws Act 3854]), which the board of directors was required to levy annually in an amount sufficient to meet all matured and maturing bonds and coupons for that year (section 39); provided that the assessments should be paid into the treasury and apportioned to the different funds (section 39a); that the assessments were to be paid in gold and silver coin (changed in 1933 to "lawful money") (section 41, as amended by St. 1933, p. 1627); that there should be three funds, bond fund, construction fund, and general fund (in 1931 the first fund was divided into the bond principal fund and the bond interest fund (section 67); and that upon presentation, a matured bond or interest coupon should be paid from the bond fund or, if money were not available, it should be registered and draw interest at 7 per cent. (in 1931 this section was amended to provide for payment of bond principal from the bond principal fund and of interest coupons from the bond interest fund in harmony with changed section 67 (section 52). By the general terms of the act, the bondholder had the right to have his bonds paid upon presentation if money were available and if not to have them registered and paid in the order of presentation. *Bates v. McHenry*, 123 Cal. App. 81, 10 P.(2d) 1038.

[1,2] It thus becomes apparent that the result of the questioned section is first of all to abrogate the law with respect to the order of payment. So changed, it is as though the law read: Landowners who are the owners or who become such by purchase or otherwise of matured bonds or interest coupons shall be entitled to payment in preference to or without regard to bonds or coupons which have matured and which have been presented and registered previously for payment. In the second place, in view of the only condition of the section, to wit, that the bonds or coupons shall be matured and be "unpaid by reason of insufficiency of money," the result, regardless of the financial condition of the district, is to hold before the landowners, the source of the money with which the district makes payment, the temptation of withholding payment of assessments in order to bring about the named condition and a depreciated market for the bonds, which may then be purchased and used as a medium of payment at face value. The two results mentioned very obviously demonstrate that the non-landowning bondholder would suffer a very severe change of his contract were it to be held that the section does not impinge upon the constitutional provision against the impairment of the obligation of contracts. It requires no argument to establish that time and method of payment are material and vital parts of the obligations of a contract. The books are full of authorities to this effect, of which we need only cite the following: *Hershey v. Cole*, 130 Cal. App. 683, 20 P.(2d) 972; *Security Trust & Savings Bank v. City of Los Angeles*, 120 Cal. App. 518, 7 P.(2d) 1061; *Welsh v. Cross*, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796; *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962; *Jeffreys v. Point Richmond C. & L. Co.*, 202 Cal. 290, 260 P. 548.

It is no answer to say, as does petitioner, that the postponement of time of payment is caused by conditions, and not by the act of the district in accepting bonds or coupons in payment of the assessment. The very statement of the argument refutes itself, because the bondholder next in order of presentation is entitled to be paid with the sums realized from the assessment for that purpose and not to be indefinitely postponed. Going one step further into the field of practical

finance for the purpose of illustrating the seriousness of the impairment, and bearing in mind that confidence is the foundation upon which the superstructure of credit and prosperity is built, we may well query: How many bonds could have been sold to others than landowners had the questioned section with its incentive to default in the payment of assessments been a part of the law at the time the bonds were issued? Obviously, too, there is no merit in the suggestion of petitioner that the act affords a secondary market to the bondholder. What has been said also disposes of the contention that the acceptance of the bonds in payment of the assessment retires the bond and gives the bondholder greater assurance that eventually his bond will be paid.

Similar legislation has been condemned by the courts in the following cases: In re Cranberry Creek Drainage District, 202 Wis. 64, 231 N. W. 588, 85 A. L. R. 242; Howard v. State, 226 Ala. 215, 146 So. 414; State v. Cherry, 188 Ark. 664, 67 S. W.(2d) 1024; Straus v. Ketchen (Idaho) 28 P.(2d) 824; McNee v. Wall (D. C.) 4 F. Supp. 496; Keefe v. City of St. Petersburg (D. C.) 5 F. Supp. 132; Moore v. Branch (D. C.) 5 F. Supp. 1011.

[3] However, the petitioner argues that the legislation may be sustained upon the theory that it was designed to meet an emergency and hence its validity may be upheld upon the authority of *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, and *Des Moines Joint Stock Land Bank v. Nordholm*, 217 Iowa, 1319, 253 N. W. 701. The first of the two mentioned cases involved a statute of Minnesota (Laws Minn. 1933, c. 339) which provided that "only during the continuance of the emergency and in no event beyond May 1, 1935" (section 8), the period of redemption might be extended by the application of the mortgagor to the court having jurisdiction of the foreclosure, for an order fixing the reasonable value of the income or the reasonable rental value of the property involved and directing him to pay all or a reasonable part thereof "toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness" (section 4) at the times and in the manner to be fixed and determined. The act recited the emergency. It further provided that, in case of the failure of the mortgagor to pay the sums required by the

order or the commission of waste by him, the period of redemption should expire thirty days thereafter. In sustaining the legislation against an attack upon the ground that the act infringed the provision of the Federal Constitution forbidding states to pass laws impairing the obligations of contracts, a majority of the Supreme Court said, 290 U. S. 398, 54 S. Ct. 231, at page 242, 78 L. Ed. 413, 88 A. L. R. 1481: "The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." It also said: "The relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions." In view of this last-quoted statement and in order to properly evaluate its significance, we also quote a passage which very shortly follows and which may be said to constitute the whole crux of the case. It reads: "In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. The 'equity of redemption' is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security, that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common-law judges, who thought that by 'the Growth of Equity on Equity the Heart of the Common Law is eaten out.' The equitable principle became firmly established, and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim 'once a mortgage, always a mortgage, and nothing but a mortgage.' Although the

courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction."

Again the court said: "The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts." The Nordholm Case, decided by the Supreme Court of Iowa, involved a similar statute and a similar result was reached by a divided court upon the authority of the Blaisdell Case.

We are not confronted by a similar question. The Legislature did not with respect to the present legislation declare the emergency, nor did it purport to confine the act to the period of an emergency. In fact, legislation of a different character was adopted in 1933 (amended to California District Securities Commission Act, St. 1933, p. 355), which, while declaring the existence and nature of the emergency and the necessity of exercising "the police power of the state to preserve the public welfare," provided that when any district is in default on its bond principal or interest "to the extent of not less than twenty per cent (20%) of the amount due" (section 1), it shall become subject to the supervision of the California district securities commission which shall make an investigation of its affairs and which may approve the annual assessment only for such total amount as it will be reasonably possible for the lands in the district to pay "without exceeding a delinquency of fifteen per cent" (section 1). A consideration of the fact of the declared emergency in the act just mentioned, together with other legislation avowedly designed to meet the exigencies of the times, and the entire absence of similar declaration with respect to the section under consideration, or limitation of its operation, is sufficient evidence that it was not intended solely as a measure to meet an emergency. In this connection it

is enlightening to observe the comments of the United States Supreme Court in the case *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 54 S. Ct. 816, 819, 78 L. Ed. 1344, 93 A. L. R. 173, upon its previous opinion in *Home Building & Loan Ass'n v. Blaisdell*. We there read: "We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency*. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the case of *Blaisdell*, we sustained the Minnesota mortgage moratorium law in the light of the *temporary and conditional relief* which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed*." (Italics ours.) In a later case, that of *W. B. Worthen Co. v. Kavanaugh*, 55 S. Ct. 555, 79 L. Ed. 1298, decided April 1, 1935, by the United States Supreme Court, this construction of the *Blaisdell* Case was affirmed. Not only is there no attempt to confine or limit the act to the emergency, but also it does not consider the interest of the nonlandowning bondholder. It cannot be said of section 52a of the California Irrigation District Act, as was said in the *Blaisdell* Case, 290 U. S. 398, 54 S. Ct. 231, at page 243, 78 L. Ed. 413, 88 A. L. R. 1481: "The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors." Petitioner's argument that the bondholder is credited with 7 per cent. interest after maturity and presentation falls short of the mark for the obvious reason that this right to be credited with an increased interest rate is one extended originally to all bondholders upon the maturity and presentation of their bonds and coupons, and has no bearing upon the right of the bondholders to payment in the order of the presentation of the bonds or coupons. In short, the section attempts to extend a preference instead of considering the interests of all parties. In view of the absence of a declared legislative intent to adopt the section as an emergency measure, and of its failure to limit its operation to the exigen-

cy to which it is said to be directed, and of the fact that the section, in effect, is preferential rather than considerate of the interests of all parties, together with the further fact that the "procedure and relief" here attempted to be extended are not, as they were in the Blaisdell Case, "cognate to the historic exercise of the equitable jurisdiction," it must follow that the legislation must fall under the reasoning of that case.

This conclusion renders unnecessary any consideration of the other objections of respondent to the acceptance of the coupons in payment of assessments.

The peremptory writ is denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

3 Cal.2d 655

FOX PENINSULA THEATRE et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
S. F. 15373.

Supreme Court of California.
May 24, 1935.

Rehearing Denied June 20, 1935.

Master and servant ⇨405(6)

Evidence held to support finding of commission, in determining compensation payable to 18 year old boy who was injured while employed by theater to distribute advertising matter, that under ordinary circumstances boy would probably have been able to earn, after attaining age of 21, \$25 per week in occupation in which he was employed at time of injury (Gen. Laws 1931, Act 4749, § 12 (c)).

In Bank.

Certiorari to Industrial Accident Commission.

Petition by the Fox Peninsula Theatre, a corporation, employer, and the Fidelity & Casualty Company of New York, insurer, for a writ of certiorari to review an award of the Industrial Accident Commission in favor of Harry Grant, Jr., employee, by his guardian ad litem, Harry E. Grant.

Award affirmed.

For prior opinion, see 38 P.(2d) 815.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten, of San Francisco (Keith & Creede, of San Francisco, of counsel), for respondents.

IRA F. THOMPSON, Justice.

This case is before us on a writ to review an award of the Industrial Accident Commission in favor of the minor, Harry Grant, who was injured by a fall from a car in which he was being transported with others who were distributing advertising matter for the Fox Peninsula Theatre. He was at the time of the injury 18 years old. The commission found the percentage of permanent disability to be 59¾.

The sole question for determination here is whether the evidence supports the following finding of the commission: "The foregoing disability indemnity is based on average earnings of \$25 weekly, which is deemed to be the weekly sum that under

ordinary circumstances he would probably have been able to earn after attaining the age of 21 years in the occupation in which he was employed at the time of injury, had he not been injured."

This finding was made under section 12 (c) of the Workmen's Compensation, Insurance and Safety Act of 1917, as amended (Deering's Gen. Laws 1931, Act 4749), which provides: "If the injured employee is under twenty-one years of age, and his incapacity is permanent, his average weekly earnings shall be deemed, within the limits fixed, to be the weekly sum that under ordinary circumstances he would probably be able to earn after attaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury or in any occupation to which he would reasonably have been promoted if he had not been injured, and if such probable earnings after attaining the age of twenty-one years cannot reasonably be determined, such average weekly earnings shall be based upon three dollars a day for a six-day week." It is the contention of petitioners that the applicant's probable earnings at age twenty-one could not reasonably be determined and that the statutory basis of \$3 a day for a six-day week should have been used in computing the compensation.

We have concluded that the evidence before the commission supported the finding complained of and hence it cannot be disturbed. The evidence upon which this finding is based shows that Harry Grant was 18 at the time of the injury, which occurred on September 10, 1932; that he began work for the Fox Peninsula Theatre in 1928 on part-time job as an usher, working from two to four hours a day with some extra work, at 30 cents an hour; that he quit in 1930 and went to sea as a cadet, returning to Burlingame in 1931 where he did odd jobs, also working for the Peninsula Theatre as a substitute usher at 30 cents an hour; that the theater had the ushers distribute circulars from time to time and also got in additional men who were also paid 30 cents an hour; that Harry Grant had planned to take up aviation and was going to school a period in the morning studying mathematics; and that he neither intended to follow the sea nor to remain in the show business. Not being a regular usher, Grant was definitely occupied in distributing circulars at the time of his injury. As to his probable earnings

in that occupation at the age of 21, we have the testimony of R. S. Hunter, who was in the business of distributing advertising in Oakland, that any man regardless of his education or intelligence would earn in that occupation \$3 a day for an eight-hour day; that if he had reasonable ability he could become a crew manager in about three months at \$3.50 a day, the top for men on the street being \$4, which he could obtain in another three months or so; that the usual man averages five days a week, but a certain number of the best men work fairly steadily six days a week; that there are other positions to work up to; and that a boy like Harry Grant, whom the witness had known for years, starting at 18, working part time for two years and then steadily for three years, would be making not less than \$100 a month at the age of 21.

This, we think, affords a reasonable basis for the estimate that if Harry Grant had not been injured and had continued in the occupation in which he was engaged at the time of injury, he would probably have been earning a weekly wage of \$25 at the age of 21.

The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.

3 Cal.2d 704

McARTHUR v. MT. SHASTA POWER CORPORATION.

Sac. 4765.

Supreme Court of California.

May 29, 1935.

Rehearing Denied June 28, 1935.

1. Waters and water courses ☞79

Riparian owner's diversion and use of water of river for power purposes *held* legitimate riparian use of water.

2. Waters and water courses ☞84

Land beside pool above mouth of river flowing into pool *held* riparian to such river during low-water tide in summer months when bulk of water therefrom remained in pool, as respects right of owner of land beside pool to complain of power company's use of water of such river for power purposes.

3. Waters and water courses ☞84

Remedy of riparian owner for diversion of water of stream by another riparian own-

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

er was action for damages sustained by reason of the diversion, and not action for apportionment of water of stream, where public use had attached to waters of stream because of the other riparian owner's use of water in its hydroelectric power plant.

4. Waters and water courses ⚡87

In action by owner of land beside pool for damages for power company's diversion of water of river flowing into pool, instruction that power company's maintenance of dam below mouth of river was not a defense to action, even if dam maintained level of pool at same height that pool was before water of river was diverted, *held* prejudicial error.

5. Waters and water courses ⚡80

Owner of land beside pool could not recover damages for diminution in quantity of water therein because of power company's diversion of water of river flowing into pool, where power company restored natural level of pool by constructing dam, although owner could recover damages for pollution of water resulting from diversion.

6. Waters and water courses ⚡64

Riparian owner is entitled, even as against another riparian, to substantially unpolluted stream as well as to undiminished flow of water.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Anna McArthur against the Mt. Shasta Power Corporation. From a judgment for the plaintiff, the defendant appeals.

Reversed and remanded for new trial.

William B. Bosley and Thomas J. Straub, both of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Jesse W. Carter, of Redding (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

This case and four others are companion cases, each having been instituted by a different plaintiff against the defendant, the Mt. Shasta Power Corporation. In each case the plaintiff, as owner of land located on Pittville pool, sought to recover damages alleged to have been sustained by

reason of the diversion of the waters of Fall river some two and one-half miles above the confluence of that river with Pit river. The waters of Fall river, after their diversion, are conducted by defendant to its power house, situated about seven miles below the confluence of said two rivers, where after their use for the purpose of generating hydroelectric power, they are returned to the natural channel of Pit river. All five of said actions were tried, and resulted in substantial damages in favor of the respective plaintiffs and against the defendant. It is admitted by both sides that the same factual situation exists in all of said actions. Two of said actions have been before this and the District Court of Appeal on three separate occasions: *Crum v. Mt. Shasta Power Corporation*, 117 Cal. App. 586, 4 P.(2d) 564; *Albaugh v. Mt. Shasta Power Corporation*, 117 Cal. App. 612, 4 P.(2d) 574; *Crum v. Mt. Shasta Power Corporation*, 124 Cal. App. 90, 12 P.(2d) 134; *Albaugh v. Mt. Shasta Power Corporation*, 124 Cal. App. 779, 12 P.(2d) 137; and *Crum v. Mt. Shasta Power Corporation and Albaugh v. Mt. Shasta Power Corporation*, 220 Cal. 295, 30 P.(2d) 30. On the two occasions when the *Crum* and *Albaugh* Cases were decided by the District Court of Appeal, a petition for a hearing of each of said cases was asked of this court, which petition was in each instance denied. We have, therefore, given the *Crum* and *Albaugh* Cases consideration upon three separate occasions. We might here explain that when these two cases were first before the District Court of Appeal, as is shown by the decisions therein reported in 117 Cal. App., 4 P.(2d), the main opinion of the court was rendered in the *Crum* Case, followed by a short memorandum opinion in the *Albaugh* Case. The same procedure was followed when they were before that court on the second occasion, as will appear by reference to the decisions therein reported in 124 Cal. App., 12 P.(2d). When the cases were before this court on the occasion of their second appeal, they were consolidated and one decision was rendered in the consolidated cases, 220 Cal. 295, 30 P.(2d) 30. As before stated, the factual situation out of which these five controversies arose is practically the same in all five cases. Each plaintiff is the owner of lands fronting upon Pittville pool, which is a mere enlargement of the bed of Pit river. The pool extends from Young's

falls in a southwesterly direction to a rock reef, a distance of about $8\frac{1}{2}$ miles. It has a width of 145 feet. About 500 feet above this rock reef, Fall river, in its natural state, flowed into Pittville pool, and, the plaintiff contends, contributed a substantial amount of water which was impounded in said pool. The basis of the complaint of the plaintiffs in said five actions is that by reason of the original flow of Fall river into Pittville pool their lands located on Pittville pool are riparian to Fall river, and that the diversion of the flow of Fall river from its natural channel before it reached Pittville pool was an infringement upon their riparian rights. The facts in detail are fully set forth in the case of *Crum v. Mt. Shasta Power Corporation*, 117 Cal. App. 586, 4 P.(2d) 564, and it is not necessary for us to repeat them here.

Appellant rests its case upon the following propositions:

1. That the use which it makes of the waters of Fall river is a beneficial riparian use.

2. That respondent's lands are not riparian to Fall river and therefore she cannot complain of the use of the waters of Fall river by the appellant.

3. That if respondent's lands are riparian to Fall river, then appellant and respondent are opposite riparian owners and have correlative rights to the use of the waters of Fall river. In any controversy therefore arising between said parties as to an excessive use of the waters of said stream by one party as against the other, the remedy is not in an action for damages by the one complaining of said excessive use, but is for a division or apportionment of the waters of the stream, taking into consideration the reasonable needs of both.

4. That even if an action in damages will lie in favor of the respondent, the amount awarded is excessive.

Respondent's position is one of complete opposition to each and every one of these propositions. Her contentions are that appellant's diversion of Fall river, in so far as it affects respondent's rights in said stream, is wrongful; that her lands are riparian to Fall river; that she has sustained serious injury by appellant's use of the waters of Fall river; that her remedy for such use lies in an action for damages, and that the damages awarded are not excessive.

[1] In considering the contention of the appellant that the use which it makes of the waters of Fall river is a beneficial riparian use, it is important that we refer to the admitted fact that appellant is the owner of the bed and banks and all lands riparian to Fall river on each side thereof from a point therein above its diversion works to the confluence of said river with Pit river, and also the bed and banks and all land riparian to Pit river from a point above the junction of said two rivers down to a point some distance below its power house, where the waters of Fall river are returned back into Pit river, with the exception of one piece of land on Pit river, the riparian rights of which have been acquired by the appellant from the owners thereof for use by it in the generation of power at its power plant; and, furthermore, that all water diverted by appellant from Fall river is diverted on appellant's said riparian lands, and is used by it for the generation of electric power and is returned to Pit river before it leaves appellant's riparian lands. The right of appellant to divert the waters of Fall river in the manner herein shown and to use the same in its said power plant for the purpose of generating electric power was before this court in the case of the Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation, 202 Cal. 56, 259 P. 444, 56 A. L. R. 264, and it was there held that said use by appellant was a legitimate riparian use of the waters of Fall river. The same determination was reached by the District Court of Appeal in the case of *Crum v. Mt. Shasta Power Corporation*, supra, 117 Cal. App. 586, 4 P.(2d) 564. There the court held, 117 Cal. App. 586, page 600, 4 P.(2d) 564, 569, "that the appellant's use of the water of Fall river was for proper riparian and beneficial purposes."

On the second appeal of the *Crum* and *Albaugh* Cases, supra, 220 Cal. 295, 30 P. (2d) 30, 35, the character of appellant's use of the waters of Fall river was given consideration by this court. There is nothing to be found in that decision which would indicate a departure from the previous holding of the Appellate Court as to the riparian character of appellant's use of the waters of said river. Some question arose in that case as to the construction to be placed upon the above quoted language of the Appellate Court, and in construing that language we said: "As we

interpret the last-quoted statement, all that was intended thereby was that the use of water for power purposes under a proper state of facts is a proper riparian use. * * * The courts of this state have long recognized that a riparian owner in the proper exercise of his riparian right may use the water as a motive power to propel machinery subject only to the domestic uses of lower riparians. However, this does not mean that the use of such waters for power purposes gives any riparian owner any greater right than any other riparian use would give him." In the light of these judicial declarations as to the character of appellant's use of waters of Fall river, the question cannot be now regarded as an open one. For all purposes of this action it must be held that appellant's diversion and use of the waters of Fall river for power purposes as shown by the undisputed evidence in this case is in the exercise of its riparian rights in and to the waters of said river.

[2] The second proposition advanced by appellant is that respondent's lands are not riparian to Fall river, and therefore she cannot complain of the use of the waters of said river by the appellant. Appellant, as we understand its position, concedes that if the respondent's lands are riparian to Fall river, then, if she sustains any legal injury by appellant's diversion and use of the waters of Fall river, she has just cause of complaint, and may protect her rights in said waters by some appropriate action. It is necessary for us, then, in the first instance to determine whether respondent's lands are riparian to Fall river. The claim of appellant that respondent's lands are not riparian to Fall river is based upon the fact that respondent's lands are located on Pittville pool, some miles above the junction of Fall river and Pit river, and the contention of appellant that the waters of Fall river flow down stream when they reach Pittville pool, and do not flow into or mingle with the waters of Pittville pool. In the first trial of the Crum and Albaugh Cases it was contended that the bed or bottom of Pittville pool was some few feet lower at the upper end of the pool than it was at the junction of Pit river and Fall river, and that the waters of Fall river, which are slightly colder than the waters of Pit river, displace the Pit river water at the bottom of the pool and thus create a subsurface current

which finds its way upstream along the bed of the pool. The District Court of Appeal rejected this theory on the first appeal of the Crum and Albaugh Cases, supra, 117 Cal. App. 586, 595, 4 P.(2d) 564, 567; 117 Cal. App. 612, 4 P.(2d) 574. That court did hold, however, that: "It seems more reasonable to believe that, when the water of Fall river was poured into this reservoir called Pitville pool, it circulated and mingled indiscriminately with the waters contributed thereto from all other sources, so as to equalize the temperature and form the corpus of a miniature lake which was impounded by the barrier of the rock reef dam at its lower extremity." 117 Cal. App. 586, page 595, 4 P.(2d) 564, 567. From these facts the court concluded, 117 Cal. App. 586, page 597, 4 P.(2d) 564, 567: "So long as the bulk of water from Fall river remains impounded in Pitville pool, we may assume, upon the reasoning of the last-mentioned case [Turner v. James Canal Co., 155 Cal. 82 [99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823], that plaintiff's land is riparian to Fall river." Upon the same page of the opinion the court further stated: "It must be conceded, however, that the same situation does not prevail in times of flood water during which these two rivers rush down over the dam with mighty velocity at a depth of many feet. It is apparent that under such conditions very little of the water of Fall river remains impounded in the pool. During the season when the flood water and current of Pit river carry Fall river water down over the dam, the plaintiff's land is not riparian to Fall river. It follows that, while the plaintiff's land may be riparian to Fall river during times of low water in the summer, it is not riparian to that stream during the season of flood water in the winter months." From this excerpt from the opinion of the District Court of Appeal in that case, as well as other direct and positive statements found in said opinion, there is no uncertainty as to the position of that court regarding the claim by the plaintiff in said action, that his lands in the summer months are riparian to Fall river. The decision in that case has become final, and the appellant therein, who is also the appellant in this case, made no attempt in this court to have the same set aside or modified. It seems rather late in the day for it now to take a position an-

tagonistic to the ruling of the District Court of Appeal in the Crum and Albaugh Cases. However, the same question came before this court on the second appeal of the Crum and Albaugh Cases, when we quoted with approval from the opinion in the first appeal of the Crum Case and expressly held that the lands of Crum and Albaugh were riparian in the summer months to Fall river. The language used by us on that occasion and found on page 300 of 220 Cal., on page 32 of 30 P.(2d), is explicit and positive and consists of the following statement: "This physical condition, according to plaintiffs' theory, makes their lands riparian to Fall river in the summer months, although their lands are located more than 5 miles from where the Fall river empties into the Pit river. We agree with plaintiffs that the evidence introduced on this trial, as well as the law of the case, as established on the prior appeals, fully establishes that Pittville pool is a natural reservoir, which is filled with water in the summer months from both the Pit and Fall rivers, and that in those months plaintiffs' lands are riparian to both streams. We are of the opinion that the evidence establishes that Fall river, in the summer months, in a state of nature, contributed a large quantity of water to this pool, which water mingled with and became an inseparable part of the corpus of the water in the pool. In other words, Pittville pool is a miniature lake in the summer months, its waters in that period consisting of Pit and Fall river waters, mingled indiscriminately. We cannot add to what the District Court of Appeal said on this point on the prior appeal in the Crum Case." Then follow extended quotations from the opinion of the District Court of Appeal in the Crum Case, including the paragraph thereof hereinabove quoted. While, of course, none of the opinions in the Crum and Albaugh Cases can be accepted as the law of the case in determining any question arising in this or the two other companion cases, yet, as we have before stated, these five cases involve the same state of facts, and under the principle of stare decisis the decisions rendered in the Crum and Albaugh Cases are direct authority upon any question decided therein which may arise in the present action, or in the two companion cases which are now pending before us. From the legal principles established in the Crum and Albaugh Cases as applied to the facts

in the present action, the question as to the riparian character of respondent's lands is no longer in any doubt. As respondent's lands are identical in their location with the Crum and Albaugh lands, it follows that her lands are riparian to Fall river during the summer months, and therefore she is entitled to complain of appellant's use of the waters of said river, if said use infringes upon her legal rights in said waters, as a riparian owner.

[3] The third proposition advanced by the appellant is that if respondent has been injured in her legal rights by the diversion of the waters of Fall river by the appellant, her remedy is by an action for a division or apportionment of said waters, and not for damages sustained by reason of the excessive use of said waters by appellant. Like the two preceding questions to which we have given consideration, this question was before the appellate and this court in the first and second appeals in the Crum and Albaugh Cases. The contention of appellant as to the nature of respondent's remedy finds support in none of the decisions rendered by either of said courts in the Crum and Albaugh Cases. On the contrary, the decisions, both of the District Court on the first appeal and of this court on the second appeal, held that respondent's remedy was one in damages and not for apportionment. In *Crum v. Mt. Shasta Power Corporation*, decided by the District Court of Appeal, 117 Cal. App. 586, on page 603, 4 P.(2d) 564, 570, that court, in discussing the remedies which the respondent therein might pursue in protection of his rights in that case states its conclusion in the following language:

"We have held that plaintiff's land is technically riparian to Fall river because it borders on Pittville pool, to which pond that stream contributes a substantial quantity of water during the dry season. It follows that a diversion of that river destroys the natural condition which makes the land bordering on Pittville pool riparian to that stream. If the contribution of Fall river water to Pittville pool is beneficial to the land of plaintiff, then he is afforded a remedy for its withdrawal, by means of a suit for damages or for injunctive relief. He has seen fit to rely upon a suit for damages.

"The appellant contends that, since the flow of Pit river is always adequate to

keep the pool filled to a depth which results in a constant flow over the rock reef barrier, the contribution of Fall river water is neither necessary nor beneficial to plaintiff's land. This is not necessarily true. Conditions may change. The removal of Fall river water may diminish the quantity or impair the quality of the water which is impounded in that pool. Assuming the evidence does adequately show the water which is normally contributed to Pittville pool is beneficial to the land of the plaintiff which is located thereon, the plaintiff would be entitled under the pleadings in this case to whatever actual damages he has suffered from the diversion of the stream."

While that court did not, in its opinion, state the basis for its conclusion that the plaintiffs' remedy was an action for damages, on the second appeal of the Crum and Albaugh Cases, this court gave further consideration as to the remedy which might be pursued by the plaintiffs in those actions and held that as a public use had attached to the waters of Fall river by the appellant's diversion and use of the same for the generation of electric power, action for apportionment of said waters would not lie. The language of this court used in said discussion is to be found in the first paragraph of our opinion in that case, 220 Cal. 295, 297, 30 P.(2d) 30, 31, and is as follows: "A rehearing was granted in this case to give further consideration to two points discussed in our former opinion. The first point has to do with the proper interpretation of the case of *Joerger v. Mt. Shasta Power Corporation*, 214 Cal. 630, 7 P.(2d) 706, and the application of the rule of that case to the facts of this case. Upon further consideration we are of the opinion that the discussion of the *Joerger* Case was not necessary to the opinion and may be stricken therefrom without in any way affecting the result. The opinions of the District Courts of Appeal [124 Cal. App. 90, 779, 12 P.(2d) 134, 137] in these cases have clearly established the law of the case to be that the plaintiffs are entitled to damages. To the discussion contained in our former opinion on this point, we add the following observation: Assuming, but not deciding, that defendant's use of the water is in the exercise of its riparian rights, but constitutes an excessive use of the waters of Fall river; plaintiff could not, as contended by defendant, secure an

apportionment of said waters. This is so for the reason that a public use has attached to the entire flow of Fall river. If plaintiffs should bring an action for apportionment, they would be immediately met with the defense that a public use had attached to the entire flow. The same reasons that prevent the plaintiffs from securing an injunction in the present cases would prevent them from securing an apportionment." The statement in that opinion that a public use had attached to the waters of Fall river was predicated upon the undisputed evidence produced at the trial of said action. Practically the same evidence was before the court at the trial of this action, and upon which the court made an express finding, the effect of which was that a public use had attached to the waters of Fall river by the appellant's diversion and use thereof in its hydroelectric power plant.

There can be but one conclusion drawn from the foregoing facts and the law as applied to said facts in the two Crum and Albaugh appeals—and that conclusion is that the respondent's remedy in this action is not an action for the apportionment of said waters, but one in damages suffered by respondent by reason of appellant's diversion of the waters of Fall river.

This brings us to the fourth and final proposition or contention of the appellant, and that is that the amount of damages awarded respondent is excessive.

This question, in the light of the decisions in the Crum and Albaugh Cases as applied to the facts in this case, presents a rather involved matter for determination. On the first appeal of the Crum and Albaugh Cases, the District Court of Appeal reversed the judgments in favor of the plaintiffs in said action and held that the award of damages in each of said actions was excessive. On the second appeal of these cases this court reversed the judgments therein in favor of the plaintiffs in said action, and remanded the cases for a new trial on the issue of damages alone in accordance with the views expressed in the opinion in that action. The evidence before the trial court in the trials of the Crum and Albaugh Cases relative to the damages sustained by the plaintiffs in said actions by the diversion and use of the waters of Fall river was substantially the same as the evidence upon which the verdict of the jury was rendered

in the present action. The award of damages herein, based upon acreage and value of the respective tracts of land involved in this and the Crum and Albaugh Cases, is considerably less, proportionately, than the amount of damages awarded to the plaintiffs in the Crum and Albaugh Cases on the first trial thereof. On the first trial the jury in the Crum Case awarded damages in the sum of \$20,000, amounting to \$172 per acre, and in the Albaugh Case in the sum of \$65,000, amounting to \$162 per acre. See decision Crum and Albaugh Cases, 117 Cal. App. 586, 4 P.(2d) 564; 117 Cal. App. 612, 4 P.(2d) 574. In the present action the plaintiff's damages amounted to the sum of \$32,500, or the equivalent of \$109.44 per acre. We will not enter into a discussion as to whether the lesser proportional amount awarded in this case, as compared with the amounts awarded in the Crum and Albaugh Cases, on the first trial thereof, renders the present award invulnerable to attack on the ground that it is excessive, but will pass to the consideration of other questions involving the judgment for damages rendered in the present action.

On the second trial of the Crum and Albaugh Cases, Crum's damages were fixed at the sum of \$32,100, and Albaugh's as \$93,300. In the course of the trials of these two cases the defendant in said actions offered a written stipulation to the effect that it "does hereby undertake and promise to maintain and operate the dam which it has heretofore constructed at the rock reef in the channel of said Pit River a short distance below the natural confluence therewith of Fall River, and to maintain the level of the water in said Pittville Pool substantially at its aforesaid natural level and not lower than the top of the aforesaid dam by means of its maintenance and operation of said dam and by discharging or causing to be discharged into said Pittville Pool so much of the water naturally flowing in said Fall River and its tributary, Tule River, as may be required for that purpose from time to time, so long as the defendant shall continue to divert water from Fall River above its natural confluence with Pit River, and does hereby irrevocably consent that the judgment to be entered herein shall require this defendant to maintain and operate said dam and to maintain the natural level of the water in said Pittville

Pool as it has herein undertaken and promised to do." A copy of this stipulation in full is set out on pages 308 and 309 of the decision of this court in Crum v. Mt. Shasta Power Corporation, supra, 220 Cal. 295, 30 P.(2d) 30, 36, 37. The trial court refused to admit this stipulation in evidence or to instruct the jury in reference thereto. Upon appeal we held that it was beyond the power of the defendant corporation, without first securing the consent of the railroad commission, to agree to maintain the level of the water in Pittville pool by a release of water from Fall river, if necessary, as a public use had attached to all the waters of Fall river which had previously been diverted by the defendant corporation. As to the agreement contained in said stipulation that the defendant corporation would always maintain said dam constructed by it at the rock reef in the channel of Pit river and that the judgment might contain a provision to that effect, this court held that it was within the power of the defendant corporation to make, and that it was error on the part of the trial court to refuse admission of that part of said stipulation. Our conclusion on this subject may be found on page 311 of 220 Cal., on page 37 of 30 P.(2d), and is as follows: "However, this reasoning does not apply to the second concession contained in the stipulation, that is, the guaranty to maintain the dam. Such a guaranty was well within the powers of the company to make and in our opinion should have been admitted by the trial court. The gravity of this error in refusing to permit the jury to consider this guaranty becomes apparent when the peculiar facts of this case are considered. The evidence shows that since the construction of the dam the flow of Pit river at all times has been more than sufficient to keep Pittville pool at the level that existed before the diversion. A period of about ten years has elapsed since the construction of the dam, and during all that period the pool has been maintained at its old level. Plaintiff as far as quantity of water is concerned has failed to show any damage actual or prospective by reason of the diversion, provided the dam is maintained. This the defendant offered to do and offered that the judgment should so provide. It was error of a most serious nature to exclude from the jury's consideration this portion of the stipulation."

[4-6] While the appellant, at the trial of the present action, made no offer of such, or a similar stipulation that it would maintain said dam at the rock reef as it did in the second trial of the Crum and Albaugh Cases, it did, in paragraph III of its answer, after reciting the fact that it had constructed said dam or concrete barrier with operating gates in the bed of Pit river at the rock reef, expressly agree to maintain the same at its own expense. The precise language of said agreement is set forth in its answer, being as follows: "That said defendant agrees to and will maintain and operate at its own expense, said concrete barrier and said gates therein." While this agreement is not as full as that contained in the stipulation in the Crum and Albaugh Cases, we can see little if any difference in the legal effect of appellant's obligation assumed in its answer as stated above and the obligation which it agreed to assume in the written stipulation offered by it at the second trial of the Crum and Albaugh Cases. We have, therefore, practically the same state of facts before us as were involved in the second appeal in the Crum and Albaugh Cases. We can see no reason why our determination of the present controversy should not follow the disposition of that appeal. By excluding said stipulation at the second trial of the Crum and Albaugh Cases, the jury, of course, in arriving at the verdict did not take into consideration the fact that the appellant had erected said barrier and had agreed to maintain the same at its own expense. The witnesses, in fixing the damages sustained by the plaintiffs in said action, did not take into consideration the concrete dam with its operating gates, which to a large extent if not wholly maintained the water in Pittville pool at the same level at which it stood prior to any diversion by the defendant of the waters of Fall river. The same situation existed in the trial of this action. Practically no attention was given to the fact that the appellant had erected said barrier and had agreed to maintain it. The witnesses, in testifying to the amount of respondent's damages, were not advised that they must take into consideration the presence of the dam constructed by appellant at the rock reef. The same may be said regarding the instructions to the jury. In fact, on the other hand, the court instructed the jury "that the construction and maintenance of any dam or other structure by the de-

fendant is not a defense to this action, even if it maintains the level of Pit river without the waters of Fall river to the same height or level as they were before the waters of Fall river were diverted." The principal defense respondent makes to the giving of this instruction is that, while admitting that the construction and maintenance of said dam may be shown in mitigation of her damage, it is not a defense to the action as a whole. We think this too narrow a construction to be placed upon the language used in the instruction. We hardly think the jury so understood it. On the other hand, as we view the action of the court in the giving of this instruction, without any explanation or limitation placed upon its language, the rights of the appellant were seriously prejudiced thereby. In fact, the attitude of the trial court was to totally ignore the fact that appellant had constructed and had agreed to maintain said dam, and that that fact was not a factor in the case in any way. Its action in this respect was in harmony and strict accord with its attitude at the second trial of the Crum and Albaugh Cases, when it refused admission of the written stipulation of appellant to maintain said dam as constructed by it at the rock reef. We held this to be error, and reversed the judgments on that ground. We think the same action should be taken on the present appeal.

We held on the second appeal of the Crum and Albaugh Cases that if the construction and maintenance of said dam would maintain the level of the water in Pittville pool to the same height at which it was prior to appellant's diversion of the waters of Fall river, then the respondent's riparian lands on Pittville pool sustained no damage by the acts of the appellant in diverting said waters of Fall river, so far as the quantity of water to which respondent is entitled is involved. We further held that the evidence in those cases showed that by reason of said diversion of Fall river, the waters of Pittville pool were rendered stagnant, that the pool in summer months was covered with weeds, slime, and moss, and that the waters thereof were so polluted that cattle refused to drink the same. Our views upon that subject were expressed as follows, 220 Cal. 295, page 312, 30 P.(2d) 30, 38: "However, although it is true that under the facts of this case plaintiffs have not or will

not be damaged as to the quantity of water in the pool, it does not necessarily follow that they have not been damaged in other respects. Under the California authorities, and under the law of these cases as enunciated on the former appeals, a riparian owner, even as against another riparian, is entitled, not only to an undiminished flow of water, except as reduced by the reasonable use of other riparians and prior appropriators, but also to a substantially unpolluted stream. The riparian owner is entitled, not only to the same quantity of water, but also to the same quality of water, provided by nature in the stream. *Crum v. Mt. Shasta Power Corporation*, 117 Cal. App. [586] at page 606, 4 P.(2d) 564 [573]. We are of the opinion that the evidence in the present case offered on behalf of plaintiffs clearly shows that the quality of the water in Pittville pool has been materially impaired by the diversion and by the construction of the dam. The evidence shows, without conflict, that the waters of Fall river have always been clear and pure, while the waters of Pit river have always been dark and murky. The evidence likewise shows that before the diversion the waters of Fall river rushed down into Pittville pool with a minimum flow of 1,000 second feet. The Fall river waters, as we have already held, mingled with the dark murky waters of Pit river to form the pool. The jury could have reasonably inferred that the Fall river waters freshened the water in the pool. Since the diversion, the freshening effect of the Fall river waters has been lost. Moreover, by the construction of the dam, obviously the flow of water through the crevice in the rock reef has been stopped, resulting in the Pit river water backing up. There was ample evidence introduced on behalf of plaintiffs to show that since the diversion the waters of Pittville pool have become stagnant; that the pool in the summer months is now covered with weeds, slime, and moss; and that a very undesirable odor now emanates from the pool, which is obnoxious to the senses for a distance of one-half mile from the water. There is also some evidence that since the diversion cattle will not drink the polluted water. There is ample evidence from which the jury could have found that these conditions did not exist before the diversion, and from which the jury could have inferred that the changed conditions were caused by the diversion and by the construction of the dam. It

hardly need be added that, if such changed conditions resulted in a material impairment of the value of plaintiffs' lands, plaintiffs may recover therefor."

The foregoing statement correctly expresses our views respecting the issues now before us, and which are precisely like those determined by us in our former opinion from which said statement was taken.

Appellant contends that the question of pollution is not properly before us, and respondent contends that though the level of the pool may be kept at its original height by the construction of said dam at the rock reef, yet the quantity of water flowing into Pittville pool has been so depleted by the diversion of the appellant that it is insufficient to meet the needs of the respondent and other riparian owners on Pittville pool. These two contentions have each received consideration in our former opinion and in those of the District Court of Appeal in the *Crum* and *Albaugh* Cases. They have each been held to be untenable, and we deem it a waste of time to enter into a further discussion of either of them.

It is further evident from what we have said that neither at the second trial of the *Crum* and *Albaugh* Cases, nor at the trial of this case, were the merits of the dam erected by appellant at the rock reef in Fall river determined by the court. In fact, the presence of the dam was to all intents and purposes, ignored by the trial court at the trial of each of the cases. It has been assumed that its construction and maintenance in the manner heretofore described would maintain the level of Pittville pool at its original height, but that fact has never been definitely determined by the court. In fact, at the second trial of the *Crum* and *Albaugh* Cases, in connection with the stipulation offered by appellant, said appellant agreed that if the level of said pool by the construction of said dam was not maintained at its original height, the appellant would agree to release sufficient water from Fall river to keep the level of the pool at the height existing before the diversion of the waters of Fall river by appellant. We held, as a public use had attached to these waters of Fall river, that it was beyond the power of the defendant in those cases to make such concession without the consent of the Railroad Commission. We do not wish to be understood as foreclosing the parties hereto, in case of a further trial of this

action, from litigating the effectiveness of said dam and operating gates, erected at said rock reef, to maintain the level of the water in Pittville pool at its original height, without discharging therein a portion of the waters of Fall river.

As we view this case, all the issues herein have been determined, except the one issue of damages, and in the event of a retrial, the court will be limited to the determination of this one issue.

For the reasons expressed herein, the judgment is reversed, and the case is remanded for a new trial on the issue of damages alone, in accordance with the views set forth in this opinion. Each party to pay his own costs.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SPENCE, Justice pro tem.; NOURSE, Justice pro tem.

ent's lands front on Pittville pool, and are located on the opposite side of said pool from the Anna McArthur lands and the lands of Roderick McArthur, involved in 45 P.(2d) 816. The same factual situation exists in this case as was presented in the Anna McArthur Case. For this reason the decision in this case must be the same as that rendered and filed in the Anna McArthur Case.

Upon the authority of that case the judgment in the present action is reversed, and the case is remanded for a new trial on the issue of damages alone, in accordance with the views expressed in the opinion this day filed in the case of Anna McArthur v. Mt. Shasta Power Corporation. Each party to pay his own costs.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SPENCE, Justice pro tem.; NOURSE, Justice pro tem.



3 Cal.2d 766

**Luther McARTHUR, Plaintiff and Respondent,
v. MT. SHASTA POWER CORPORATION
(a Corporation), Defendant and Appellant.**
Sac. 4710.

Supreme Court of California.
May 29, 1935.

Rehearing Denied June 28, 1935.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Jesse W. Carter, of Redding (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

This action is referred to in the opinion this day filed in the case of Anna McArthur v. Mt. Shasta Power Corporation, 45 P.(2d) 807, and is a companion case to the Anna McArthur Case. Respond-



3 Cal.2d 765

Roderick McARTHUR, Plaintiff and Respondent, v. MT. SHASTA POWER CORPORATION (a Corporation), Defendant and Appellant.
Sac. 4711.

Sac. 4711.

Supreme Court of California.
May 29, 1935.

Rehearing Denied June 28, 1935.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Jesse W. Carter, of Redding (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

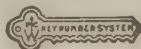
CURTIS, Justice.

This action is referred to in the opinion this day filed in the case of Anna Mc-

Arthur v. Mt. Shasta Power Corporation, 45 P.(2d) 807, and is a companion case to the Anna McArthur Case. Respondent's lands front on Pittville pool and are located on the same side of said pool as the Anna McArthur lands, and between the two parcels of Anna McArthur lands involved in her said action against the appellant herein. The same factual situation exists in this case as was presented in the Anna McArthur Case. For this reason the decision in this case must be the same as that rendered and filed in the Anna McArthur Case.

Upon the authority of that case the judgment in the present action is reversed and the case is remanded for a new trial on the issue of damages alone, in accordance with the views expressed in the opinion this day filed in the case of Anna McArthur v. Mt. Shasta Power Corporation. Each party to pay his own costs.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SPENCE, Justice pro tem.; NOURSE, Justice pro tem.



3 Cal.2d 235

In the Matter of the ESTATE and Guardianship of Voslave VUCINICH et al., Minors. Bozo ANGELICH, Appellant, v. Vladimir VUCINICH, Guardian of the Estate of Voslave Vucnich, Alexander Vucnich, and Desanka Vucnich, Minors, Respondent.

L. A. 14523.

Supreme Court of California.
April 30, 1935.

In Bank.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.
Prior opinion 44 P.(2d) 567.

Henry E. Carter, of Los Angeles, for appellant.

Vladimir Vucnich, of San Francisco, and Jennings & Belcher, and Frank B. Belcher, all of Los Angeles, for respondent.

PER CURIAM.

Good cause appearing, it is ordered that the opinion of this court in the above-entitled matter, filed April 18, 1935, and appearing in 44 P.(2d) 567, 568, be amended by striking out therefrom the sentences on page 568, column 1, reading as follows: "That case involved the estate of a minor; the instant case is concerned with the estate of an incompetent. However, the underlying principles are the same, and the basis of the rule, the disability of the ward, is present in each case."



7 Cal.App.2d 437
DAINTY PRETZEL CO., Inc., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.
Civ. 9831.

District Court of Appeal, First District,
Division 1, California.
June 7, 1935.

1. Exceptions, bill of $\text{C}\text{--}60(1)$

A motion and order to strike out a proposed bill of exceptions will lie in a proper case.

2. Exceptions, bill of $\text{C}\text{--}53(3)$

Writ of mandate to compel settlement of bill of exceptions is not a matter of right, and writ must be refused where proposed bill of exceptions is lacking in essentials, or where it fails to show an attempt to present such a fair statement of case as entitles it to be considered and settled as bill of exceptions.

Application by Dainty Pretzel Company, Incorporated, for a writ of mandate to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, Honorable T. I. Fitzpatrick, Judge of Department No. 8 thereof, and another, to compel such court and judge to settle proposed bill of exceptions.

Peremptory writ denied.

Rudolph J. Scholz and Hatch & Mahl, all of San Francisco, for petitioner.

Brobeck, Phleger & Harrison and Chas. J. Wiseman, all of San Francisco, for respondents.

PER CURIAM.

Petitioner herein was an "aggrieved" plaintiff in an action entitled Dainty Pretzel Co., Inc., v. J. A. Campbell Co., tried before a jury in respondent court. Thereafter, and within the time provided by law therefor, petitioner herein served and filed a proposed bill of exceptions in said action. Defendant in said action thereupon, after proper notice thereof, moved respondent court to strike said proposed bill of exceptions from its files upon the numerous grounds set forth in said motion. The motion to strike coming on regularly to be heard was granted by respondent court and the judge thereof, whereupon petitioner filed herein its petition for a writ of mandate whereby respondent court and judge might be compelled to settle said proposed bill of exceptions.

[1] A motion and order to strike a proposed bill of exceptions will lie in a proper case. *Rauer's Law & Collection Co. v. Templar Motors Co.*, 69 Cal. App. 782, 232 P. 464. The respondent court and judge thereof determined in its order striking the proposed bill of exceptions that the proposed bill "is not a proposed bill of exceptions at all; that it does not contain any of the essentials of a proposed bill of exceptions, and cannot be regarded as such; that it is not even a skeleton bill of exceptions; that it is a sham, a frivolity, a mere pretense and a fraud; that it is not full or fair; that it is an imposition on the court and defendant; that in order for the court to settle a true bill of exceptions on the basis of such so-called proposed bill, it would be necessary for the court to prepare an entire new bill or for the defendant to do so; and that a true bill could not be settled merely by suggestion of any amount of amendments to the proposed bill short of preparing an entirely new bill; and that it does not

contain a narrative recital of the testimony adduced at the trial; * * * that the alleged facts therein stated are inaccurate, in many respects untrue, meagre and thoroughly partial; that it does not state who the witnesses were, or what they testified to, or what witnesses testified to the alleged 'evidence', or whether the so-called 'evidence' was introduced on plaintiff's case in chief or in rebuttal, or upon direct, cross or recross-examination; * * * and that it fails to state the instructions to the jury given by the court, and falsely states that certain instructions were given which were not in fact given." We have carefully examined the copy of petitioner's proposed bill of exceptions attached to the petition herein, and the same substantially sustains the finding of respondent court and judge in regard thereto.

[2] It will be observed that this is not a case where a court or judge has arbitrarily refused to settle a proposed bill of exceptions, but rather where, after consideration thereof, the same has been deemed so unfair and so wholly lacking in its essentials as to render correction by amendment impossible. Here, the court and judge has not refused to act, but has in its discretion done so contrary to the wishes of petitioner. A writ of mandate to compel the settlement of a bill of exceptions is not altogether a matter of right, and where a proposed bill is lacking in the very essentials of a bill of exceptions, a writ will not issue. *Fairbanks, Morse & Co. v. Superior Court*, 90 Cal. App. 410, 416, 265 P. 992. Nor will a writ be granted when the instrument submitted fails to show an attempt to present such a fair and bona fide statement of the case as entitles it to be considered and settled as a bill of exceptions. It is the duty of the trial court to settle a bill, not to make one. *Pacific Land Association v. Hunt*, 105 Cal. 202, 38 P. 635; *Hearst v. Dennison*, 72 Cal. 227, 228, 13 P. 628; 2 Cal. Jur. 573.

The peremptory writ is denied.

7 Cal.App.2d 409

GIESELMAN v. UHLMAN et al.

Clv. 10124.

District Court of Appeal, Second District,
Division 2, California.

June 6, 1935.

Automobiles ☞245(24).

In action for injuries sustained when automobile in which plaintiff was riding on dark misty night collided with another automobile which was waiting for train to pass, whether host, who proceeded at rate in excess of 60 miles per hour in attempt to beat train which was 250 feet away and who did not heed guest's warning of danger, was guilty of willful misconduct so as to authorize guest to recover, *held* for jury.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Lawrence Gieselman, Jr., by his guardian ad litem, Irene Gieselman, against John Uhlman and others. From a judgment for defendants pursuant to directed verdict, plaintiff appeals.

Reversed.

Ben M. Goldman and Samuel R. Leemon, both of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in favor of the defendants in an action for damages for personal injuries arising out of an automobile collision. It is a so-called "guest" case in which the defendants are charged with willful misconduct. After the evidence was closed, the defendants moved for a directed verdict, which motion the court granted and judgment was entered for the defendants upon the directed verdict. It is the contention of the plaintiff that the evidence was such that the court should have submitted the question of willful misconduct to the jury. We have reviewed the record and believe the plaintiff's contention should be sustained and the judgment reversed. Because we believe the judgment should be reversed, we shall set forth the facts and circumstances in evidence somewhat in detail (a task which the writer of this opinion ordinarily does not deem necessary or efficient where the judgment of the trial court is to be affirmed).

Viewing the evidence in the light most favorable to the plaintiff, the accident occurred on a highway in Los Angeles at a place where two sets of parallel steam railroad crossings about 235 feet apart intersect said highway. The accident happened about midnight on a dark night. A heavy mist was settling on the road. Both the road and the windshield of the auto were damp. The driver, defendant John Uhlman, in describing the thickness of the fog, testified: "Well, you couldn't make out what things were. You could maybe see it, but you wouldn't know what it was or how far away it was." The plaintiff was a guest of the said defendant, a minor, and the car was being driven by said defendant with the consent of his parents, who are also defendants. As he approached the first railroad crossing, the driver swiftly passed around an automobile proceeding in front of him. A train was seen approaching on the second railroad track when the defendant's automobile was approximately 250 feet from the place of the collision. Plaintiff said, "Do you think we can make it?" And the driver said, "Sure I can," and increased his speed to 55 or 60 miles per hour. Cars were already parked on both sides of the second track waiting for the train to pass. At a point 150 feet before the collision plaintiff yelled: "Stop! Look out! There is a car!" The driver did not reduce his speed but kept gaining speed steadily above the 55 or 60 miles per hour he was already going, and about 100 feet from the collision started swerving from one side of the highway to the other. The defendant stated in his testimony that when he arrived at a point about 15 feet from the parked car which was waiting at track No. 2 he knew he would crash into it. He had this knowledge in spite of the fact that there was room to go on either side of said car. When the collision occurred, the front end of the defendant's car went straight up in the air, came down, and stayed where it hit, but the car which it struck was thrown across the railroad track and 25 feet beyond. The plaintiff went through the windshield and was seriously injured. The train on the second railroad track passed over the highway immediately after the crash.

It seems rather apparent from the above that reasonable men might well believe that the driver, when he stepped on the gas and accelerated the speed even above the 60 miles per hour which he was already

going, knew or should have known that by doing so he was putting his car out of control in the event that stopping would be necessary; that he was discarding prudent driving even had the night been clear and the road dry. We have in mind the case of *Meek v. Fowler*, 45 P.(2d) 194, in which the Supreme Court adopted what it calls a satisfactory definition of willful misconduct. It seems to us that it was a question for the jury to determine whether the driver in deciding to beat the train under conditions which necessitated such a desperate rate of speed, placing his car out of control without any possibility of stopping within a safe distance and ignoring the warnings of the plaintiff, intentionally did something in the operation of a machine which should not have been done under circumstances disclosing knowledge, express or to be implied, that an injury to the plaintiff would be a probable result. We believe that under all the facts and circumstances in evidence it was for the jury to determine whether the driver was trying to avoid the collision or whether he was intentionally doing what he did with a knowledge then in his mind that a serious injury would be a probable (as distinguished from a possible) result, or at the least with a wanton and reckless disregard of its possible result.

Judgment reversed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



7 Cal.App.2d 455

CARLSON v. STANBITZ et al.

Civ. 10282.

District Court of Appeal, Second District,
Division 2, California.

June 7, 1935.

1. Automobiles ☞244(6)

Evidence that pedestrian was crossing highway at night at point which was neither an intersection nor an unmarked crosswalk, that motorist driving at about 20 miles an hour swerved to left in order to go behind pedestrian, that pedestrian jumped back in front of automobile which would not have

struck him if he had continued on his way, or had stood still, *held* sufficient to support findings and judgment for defendant motorist.

2. Trial ☞397(1)

Trial court was not required to find whether defendant motorist was on right or wrong side of highway when collision with pedestrian occurred, particularly where plaintiff pedestrian had alleged negligence of defendant in general terms.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by Elmer J. Carlson against Elizabeth Stanbitz, also known as Elizabeth Harbrecht, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Garner White, of Inglewood, and C. Ibbeson Sweet, of Los Angeles, for appellants.

B. W. Kemper and Ray C. Eberhard, both of Los Angeles, for respondents.

CRAIL, Justice.

[1] This is an appeal from a judgment in favor of the defendant in an action arising out of an automobile collision. The plaintiff attempted to cross a highway in the nighttime at a point which was neither an intersection nor an unmarked crosswalk. The defendant was coming along the highway at the rate of 20 miles an hour. As soon as the defendant saw the plaintiff, he turned his automobile a little to the left in order to go behind him, which he had room to do, and if the plaintiff had gone forward or had stood still defendant would have missed him, but the plaintiff jumped back in front of the defendant's car and was injured. When the collision occurred, the defendant's car was left of the center line of the highway.

The first contention of the plaintiff is that "the evidence is insufficient to justify the decision." We have reviewed the evidence in the light most favorable to the defendant, and it is obvious from what has already been said that there is substantial evidence to support the findings and judgment.

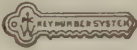
[2] The plaintiff further contends that the trial court evaded its duty in failing to state in its findings whether the defendant was on the right side or the wrong side of

the highway when the accident happened. But the plaintiff pleaded the negligence of the defendant in general terms, and there was no duty upon the trial court in any event to make a finding as to this evidentiary detail.

The final contention of the plaintiff is that the trial court erred "in deciding from the evidence that as a matter of law Bergman (the defendant) was not negligent." Obviously, the court did not decide this matter as a question of law, but as a question of fact.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 262

J. D. BASSETT MFG. CO. v. OSWALD.
Civ. 9651.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1935.

1. Payment ☞18

Whether trade acceptances were received in payment of pre-existing debt or suspended payment thereof must be determined from all facts and circumstances in evidence and parties' intent, in absence of express agreement on such question.

2. Sales ☞191

Payment for furniture purchased held not suspended by creditor's receipt and retention of debtor's trade acceptances, where letter made part of writer's guaranty of account disclosed that date of payment was not material to guarantor, except that 90 days' delay was necessary because of possible delays in shipment, and creditor pressed for collection of debt at all proper times and received no consideration for delay.

3. Guaranty ☞56

To relieve guarantor of account from liability to obligee for debt, not paid when due, there must be valid extension, supported by sufficient consideration.

4. Guaranty ☞57

Agreement to pay interest, for which debtor is already legally bound, is insuffi-

cient consideration for extension of time to pay debt, as required to relieve guarantor from liability therefor.

5. Guaranty ☞57

Guarantor is not discharged from liability by agreement for extension of time to pay debt in consideration of agreement to pay interest, for which debtor is already legally bound, though creditor attempts to enforce latter agreement.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the J. D. Bassett Manufacturing Company against George H. Oswald. Judgment for plaintiff, and defendant appeals.

Affirmed.

George D. Blair, of Los Angeles, for appellant.

Bicksler, Parke & Catlin and W. G. Danielson, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff upon a written guaranty. The contentions of the defendant are: (1) That the evidence does not support the findings of the trial court that trade acceptances which were received by the plaintiff from the principal debtor after the principal debt became due were not taken in payment of the debt; and (2) that the evidence does not support the findings of the trial court that the principal debt was not suspended.

The plaintiff's claim arose out of an order for a carload of furniture placed with it by Cross-Oswald, Ltd. On the bottom of the order the defendant, who in addition to being the guarantor of the bill was the president of said corporation, wrote as follows: "I personally will guarantee this account as per letter hereto attached. Geo. H. Oswald." The letter, which became a part of the guaranty, read in part as follows: "It is necessary that we have 90 days from date of invoice owing to the fact that from the time the car leaves the factory it is sometimes from 30 to 40 days before we receive same. It has happened in the past that your merchandise lays on the docks at Norfolk sometimes two weeks before the boat picks it up and we feel we are entitled to the

90 days from date of shipment." The furniture was duly shipped as per the order. Thereafter many demands for payment of the amount due were made, but no sum was ever paid on the amount due. Instead the principal debtor sent to the plaintiff certain trade acceptances which were payable at a later date, and thereafter the plaintiff attempted to collect on the trade acceptances by sending one to a bank for collection and by threatening to sue thereon. Nothing was said either in the correspondence or otherwise about the trade acceptances being forwarded or received in payment of the original account, although the following language was used in the letters: "* * * kindly favor us with interest-bearing Trade Acceptances payable thirty, sixty and ninety days hence, in equal amounts to take care of the balance you are due us." Again, "Your letter received regarding Trade Acceptances to settle your account." And again, "Enclosed you will find Trade Acceptance to cover our account."

[1,2] The question whether trade acceptances are received in payment of a pre-existing debt and the question whether such acceptances suspend payment of the original debt are, in the absence of any express agreement between the creditor and debtor thereon, to be determined by all the facts and circumstances in evidence bearing on them, and the intent with which the acceptances were given by the debtor and received by the creditor is an important element to be considered in their determination. In this case there was no express agreement on either question. There is clear and ample evidence in the record to sustain the finding that the trade acceptances were not received in payment of the original debt. As to whether payment of the original debt was suspended, we indulge the following observations: From an inspection of the original letter which was made a part of the guaranty, it is obvious that the date of payment for the furniture was not material to the guarantor, except that because of possible delays, which were mentioned in the letter, at least 90 days delay in payment was necessary. On the plaintiff's part he was pressing for collection of the principal debt at all proper times with diligence and zeal, writing letters and telegrams, and threatening suits. Again, the plaintiff received no consideration for the delay which en-

sued, but on the contrary he took and retained the trade acceptances only when convinced on his part that to do so was the most likely and the quickest way to make collection of the original debt.

[3-5] Under the circumstances of this case, in order to relieve the guarantor from liability, there must be a valid extension supported by a sufficient consideration; an agreement to pay interest where the debtor is already legally bound to do so is insufficient consideration; and a guarantor is not discharged by an agreement founded on such insufficient consideration, even where the new agreement is attempted to be enforced by the creditor. 13 Cal. Jur. 119, and cases cited. There is substantial evidence to sustain the findings of the trial court. As we view the facts and circumstances of this case, for us to hold otherwise would work a grave injustice.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 343

In re KICHITARO MIYAGISHIMA'S ES-
TATE.
Civ. 10118.

District Court of Appeal, Second District,
Division 1, California.

June 3, 1935.

1. Appeal and error ⇨77(2)

Order of superior court striking opposition of party to petition for distribution *held* not appealable, but any error in making order might be considered in connection with appeal from decree of distribution (Probate Code, § 1240, and § 1242, subd. 2, as added by St. 1933, p. 657).

2. Executors and administrators ⇨314(3)

Opposition of bank, which feared it might be sued as debtor, to petition for distribution of estate, *held* properly stricken, since bank was not an heir of decedent or creditor of estate and had no lien upon or interest in property of estate, and since decree of distribution could not affect any rights of bank, where probate court merely deter-

mined, as between those claiming as heirs, their respective relationships and rights (Probate Code, § 1242, subd. 2, as added by St. 1933, p. 657).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding in the matter of the estate of Kichitaro Miyagishima, deceased, by Shuu Miyagishima, administratrix of the estate of Kichitaro Miyagishima, deceased, against the Sumitomo Bank, Limited, Los Angeles Branch, and another. From an order striking out the opposition of the named defendant and from a decree of distribution, defendants appeal.

Appeal from strike order dismissed, and decree of distribution affirmed.

Marcel E. Cerf, Henry Robinson, and Herbert A. Leland, all of San Francisco, for appellants.

Ray L. Smith, of Los Angeles, for respondent.

CONREY, Presiding Justice.

Kichitaro Miyagishima, a resident of the county of Los Angeles, but of Japanese nationality, died at Los Angeles, Cal., on the 22d day of January, 1928. Surviving him were his wife Shuu Miyagishima, residing at Los Angeles, and Jiro Miyagishima, his son, residing in Japan. Decedent left no property in the state of California other than the claim or account hereinafter described, and he left no will.

On petition of the widow, filed in the superior court of Los Angeles county, she was appointed administratrix of the estate. After various proceedings in the course of administration, the administratrix filed her final account and petition for distribution, in which she described the property of the estate as follows:

"That the deceased died on January 22, 1928, in the county of Los Angeles, state of California, where he had been a resident and where he engaged in business from 1904 until the date of his death. That prior to his death, while engaged in business in Los Angeles, California, the deceased and the administratrix herein, being husband and wife, by their mutual efforts earned and saved certain monies which the deceased caused to be deposited in the Sumitomo Bank, Ltd., in exchange for which the Los Angeles Branch of said bank issued to, and in the name of, the deceased, its receipts therefor.

"The first of these deposits was made November 9, 1925 and is evidenced by receipt No. 2187 of the said Sumitomo Bank, Ltd., in which the said deposit is referred to as 4164.82 yens.

"The second and last of these deposits was made February 21, 1927 and is evidenced by receipt No. 3336 of the said Sumitomo Bank, Ltd., in which the said deposit is referred to as 2417.10 yens.

"That these deposits as evidenced by the said receipts comprise the entire estate of the deceased herein."

To said account and petition appellant Sumitomo Bank, Limited, Los Angeles Branch, filed its written opposition, whereby it objected to the making of any order whatsoever with respect to the distribution or disposition of said estate. When the matter came on for hearing, the court ordered: "* * * That the said opposition be and it is hereby stricken from the files on the ground that said bank is not a proper party to this probate proceeding and the court has no jurisdiction in this proceeding to enter judgment against said bank on the merits and the court therefore strikes said opposition (so called) and refuses to hear any evidence in support thereof."

The court, after hearing evidence, approved the account and disposed of the assets of the estate as follows: "It is hereby ordered, adjudged and decreed that the first and final account of the administratrix is hereby approved, allowed and settled and that the entire estate of the deceased, consisting of a claim, evidenced by receipt No. 2187 and receipt No. 3336 as referred to in the petition for distribution, against the Sumitomo Bank, Ltd., Los Angeles Branch, is hereby distributed to Shuu Miyagishima, widow of the above named deceased."

The present appeal is from the strike order and from the decree of distribution. The notice of appeal states that the appeal is taken by "The Sumitomo Bank, Ltd., Los Angeles Branch, and Jiro Miyagishima, sometimes called Niro Miyagishima."

The written opposition, to which we have referred, was filed by the bank alone and not by the son, Jiro. There was no appearance made by the son in the superior court prior to the proceedings for a bill of exceptions. Among the facts alleged in the opposition to hearing peti-

tion, it is there stated that the receipts referred to in the petition did not evidence any deposit of money in the bank. On the contrary, appellant alleged that the money was received by appellant from the decedent to be transmitted to "The Sumitomo Bank, Ltd., Osaka, Japan, in order that there might be issued by said bank, at Osaka, a certificate of deposit for said sum payable to said decedent at Osaka upon the surrender of said certificate of deposit"; that in fact the money was thus transmitted to the bank in Japan, which issued its receipt therefor directly to decedent. It was further alleged that by the laws of Japan the son is the sole heir of decedent; "that previous to the filing of the said petition for final distribution, a court of competent jurisdiction of the Empire of Japan assumed jurisdiction over the estate of said decedent with respect to the said moneys on deposit with the said The Sumitomo Bank, Ltd., at Osaka, Japan, and in the exercise of said jurisdiction distributed the said money to the said son of said decedent."

It was also alleged that " * * * by a judgment of a court of competent jurisdiction of the Empire of Japan, it was duly decreed that all of said property and estate descended to said son and belongs to him, and that it be paid and delivered to said son, and in due pursuance of the execution of said judgment, all of said property and estate have been paid and delivered to said son."

[1] The strike order is not an appealable order. Probate Code, § 1240. But, if the court erred in making that order, such error may be considered in connection with the appeal from the decree of distribution. Probate Code, § 1242, subd. 2; Deering's 1933 Supp. p. 209; St. 1933, p. 657.

[2] We are convinced that appellant bank is not entitled to hearing on its proposed opposition to the petition for distribution. It was not an heir of decedent. It was not a creditor of the estate. It had no lien upon, or interest in, any property of the estate. The decree of distribution could not add to the claim against the bank any element of validity which it did not theretofore possess, nor could such decree take away any defense of the bank against an action to recover on that claim. An administrator has no right to

bring debtors before the probate court for judgment against them. How then may one who is a debtor, or who fears that he may be sued as debtor, be entitled for that reason to interfere in a matter of distribution, whereby the probate court merely determines as between those claiming as heirs their respective relationships and rights? The court did not err in striking from the files the opposition of appellant bank. This leaves the bank without any ground of appeal.

The appellant Jiro Miyagishima has not shown that the decree is erroneous as against him. He had made no appearance in opposition, and on its face the decree was correct.

The appeal from the strike order is dismissed. The decree of distribution is affirmed.

We concur: HOUSER, J.; YORK, J.



7 Cal.App.2d 162

PEARSALL v. TOWNSEND et al.

Civ. 10004.

District Court of Appeal, Second District,
Division 2, California.

May 24, 1935.

As Amended on Denial of Rehearing
June 13, 1935.

Hearing Denied by Supreme Court
July 23, 1935.

1. Contracts $\S$ 187(1)

Rule that third person cannot enforce contract made in part for his benefit against one of parties thereto which cannot be enforced by party through whom third person claims because of fraud in procurement of contract is not applicable where after discovery of fraud the aggrieved party does not rescind contract but retains consideration and benefits flowing therefrom (Civ. Code, § 1559).

2. Contracts $\S$ 187(1)

Contractor held entitled to recover on contract for subdivision improvements made for his benefit by broker and investment company as against company's contention that contract was rescinded by judgment in their action for fraud against broker on original contract, where contracts were not rescind-

ed by such judgment but were merely terminated and damages for fraud awarded.

3. Banks and banking ☞312

Contractor's recovery for subdivision improvements against investment company and president thereof and owner of all company stock was not barred because of separate existence of defendants where president so confused identity with defendant company that there was no separate individuality and observance of separate existence would allow both defendants to escape liability.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by R. V. Pearsall against H. H. Townsend, E. A. Parkford, and the Mercantile Investment Company. Judgment for plaintiff, and last two named defendants appeal.

Affirmed.

A. L. Abrahams and L. R. Van Burgh, both of Los Angeles, for appellants.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action upon a contract made between the defendants and H. H. Townsend for the express benefit of the plaintiff. Hereafter he will be referred to as Townsend and will not be included when the word defendants is used. It is the contention of the defendants that the plaintiff, a third person, cannot enforce the contract against them, the defrauded parties, where the contract could not be enforced by the said Townsend. In order to understand this contention, it will be necessary to set forth a statement of the facts rather fully.

The defendant Parkford owned all of the stock of the defendant company. The defendant company was the owner of a tract of land in Los Angeles county hereafter called "Hollydale." Townsend was a real estate broker. Townsend entered into a contract with the company dated August 29, 1923, and hereafter called Exhibit A, by the terms of which Townsend agreed at his own cost and expense to subdivide the property and lay out and improve the streets and alleys and also to sell lots, paying all the sale expenses, in consideration of which Townsend was

to receive one-half of the gross sales price of all lots sold.

Pending the negotiations of the aforesaid contract, Townsend and plaintiff, Pearsall, entered into a contract by the terms of which the plaintiff agreed to do the necessary engineering, surveying, and map work to subdivide the said property, staking the lots, surveying streets, and preparing the profiles and maps. The defendants admit in their briefs that the plaintiff thereafter did the work required of him under his contract and that the price fixed was fair and reasonable. It is undisputed also that the defendants knew that the plaintiff was performing and had performed the said work in the subdivision. Townsend proceeded under the contract Exhibit A for several months with the defendant company, but difficulties between him and the company arose out of Townsend's failure to account for moneys received by him and other acts claimed by the defendant company to have been fraudulent.

In an effort to adjust and settle these difficulties, the defendant Parkford made the contract with Townsend upon which the plaintiff bases his action, hereafter called Exhibit B. Under the terms of said contract, Townsend assigned to the said defendant all of his interest in said subdivision and further agreed, "As consideration for this assignment the party of the second part agrees to advance and pay the commissions, salaries and other expenses incurred by the party of the first part and owing on account of the sales made and work done under said contract and further agrees to finance the completion of said contract in the manner hereinafter stated. * * * All existing contracts for improvements of streets, sidewalks, etc., shall be carried out and financed by the party of the second part hereunder." Thereupon the plaintiff stated to the said defendant that the total amount of his bill for services performed in the subdivision was \$5,070. It is not contended by defendants that the contract in part was not made expressly for the benefit of the plaintiff.

In the meantime the plaintiff received from the defendants a letter substantially as follows: "We have made a settlement with Mr. H. H. Townsend under which we accept payments of the outstanding obligations for the improvement work in

Hollydale. Under this agreement we accept payment of the [plaintiff's] bill and inclose check for \$1,000.00, the balance to be paid in payments of \$250.00 each." A month later the defendants asked plaintiff to send them a statement of his bill. This he did. In said statement the defendant company was named as debtor, and not Townsend. Two additional payments of \$250 each were also made as above designated. The defendants and Townsend then proceeded under the two contracts above referred to, but trouble again arose between him and the defendants and the defendants contended that Townsend was continuing his fraudulent practices. As a result, the defendants refused to go further with either contract and Townsend sued the defendants in the superior court in an action which was prior to the present one. By stipulation of the parties, the entire judgment roll in the former case was admitted in evidence herein. That action was for an accounting against the same defendants, for the appointment of a receiver to carry out the contracts, Exhibits A and B, and for general relief. Defendants answered said action and pleaded the fraud of said Townsend as a defense, but they did not rescind their contracts with Townsend and have not rescinded said contracts to this date; neither did the defendants restore or make any endeavor to restore any of the consideration received by them in the performance of said contracts. They retained all of the consideration and benefits they had received including the improvements to their land contributed by the plaintiff. They elected to proceed under their remedy for damages, specifically waiving any greater damages than the acceptance of all benefits and consideration theretofore received. In said prior action between the defendants and Townsend, the court found that "the defendants are entitled to retain said tract and all improvements thereon, and all contracts and moneys and other things of value received heretofore, or which may hereafter be received by them, or either of them, in any manner whatsoever." The court also found in said prior action that both contracts were procured by the fraud and false representations of Townsend, but the court did not find that any of his representations with regard to the plaintiff were false or fraudulent, and it is not claimed that the plaintiff participated in any manner in any fraudulent transaction, and no accusa-

tions are made by the defendants as to either the value of the plaintiff's services or as to the good faith with which they were rendered. The court further found and entered judgment that the two contracts were rightfully terminated by the defendants, and that the defendants did not owe the said Townsend any sum whatever and that said Townsend had no claim or demand against the defendants or either of them in law or in equity under said contracts. Three months after the entry of the above judgment, the plaintiff began the present action which was based upon the contract Exhibit B.

[1] It is the first contention of the defendants that "a third person cannot enforce a contract made in part for his benefit against one of the parties thereto which cannot be enforced by the party through whom such third person claims because of the fraud of such contracting party in the procurement of the contract." This is not the rule in a case such as this where after discovery of the fraud the aggrieved party does not rescind the contract but retains the consideration and benefits flowing therefrom. Section 1559, Civil Code, reads as follows: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

[2] It is the second contention of the defendant that "the contract upon which respondent sues was terminated by judicial decree and was thereby rescinded and rendered dead and unenforceable." In the prior action between the defendants and Townsend, the contracts were not rescinded, but were merely terminated and damages for fraud were assessed against Townsend.

[3] The judgment in the present case was against both defendants, and it is the final contention of the defendants that "the separate existence of a corporation, all of the stock of which belongs to an individual, may not be disregarded because of such stock ownership. Such corporate existence may be disregarded only where it appears that the observance of the separate existence would sanction a fraud or promote injustice and where it is shown that such a unity of interest and ownership exists that the individuality of the corporation and the stock owned has ceased." The contract designated as Exhibit A was signed by the defendant company. The contract designated as Exhibit B was signed

ed by the defendant Parkford. The letter to the plaintiff which read, "We have made a settlement with Mr. H. H. Townsend under which * * * we accept payment of the [plaintiff's] bill," etc., was signed by the company, "by E. A. Parkford, President." It is apparent from an examination of the evidence in the case and also from the findings that the defendant Parkford confused his identity with the defendant company so that there was no separate individuality between them. And it is apparent further that the observance of the separate existence of the two defendants would promote injustice. If the separate identities were maintained, the defendant company which nominally received the benefits of the work done by the plaintiff would be in a position to claim an escape from liability because perchance Exhibit B was signed by the defendant Parkford; and at the same time Parkford would be in a position to claim an escape from liability because he nominally had not received and retained the benefits. We find no merit in this contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; FRI-CKE, Justice pro tem.



7 Cal.App.2d 194

DONG CHUN LEN v. LUKE KOW LEE et al.
Civ. 9820.

District Court of Appeal, First District,
Division 2, California.

May 27, 1935.

1. Adverse possession ⇨47

Unsuccessful attempt by former owner of lots, sold for nonpayment of street improvement assessment, to set aside sale on motion in assessment proceedings, *held* not interruption of adverse possession thereof by one entering under deed from grantee of one to whom purchaser conveyed property.

2. Adverse possession ⇨47

Unsuccessful action against one claiming title to land by adverse possession, or motion in pending proceedings for relief, by for-

mer owner of property, does not arrest running of limitations.

3. Adverse possession ⇨113

Admission of sheriff's deed of land sold for nonpayment of street improvement assessment as evidence in action by one entering land under deed, properly admitted in evidence without objection, from grantee of sheriff's grantee, to quiet title by adverse possession, *held* immaterial; plaintiff not being bound to produce evidence of record title (Code Civ. Proc. § 749 et seq.).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Dong Chun Len against Luke Kow Lee, William H. Wolf, and others. Judgment for plaintiff, and defendant Luke Kow Lee appeals.

Affirmed.

Franklin B. Worley, of San Francisco, for appellant.

W. C. Theile and Ernest V. Scettrini, both of Salinas, for respondent J. A. Corbett.

Harry L. Noland and Sisti Segretti, Jr., both of Salinas, for other respondents.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff in an action to quiet title, one of the defendants, Luke Kow Lee, has appealed and has brought up a bill of exceptions.

Prior to 1927, the defendant was the owner of the property, two lots in the city of Salinas. He made a visit to China. In his absence a street improvement proceeding was commenced and conducted to a conclusion. That proceeding resulted in a sale of the property for nonpayment of the defendant's assessment. In 1930, the defendant returned to Salinas, and on learning what had taken place he appeared in the street assessment proceedings and applied for relief. His motion was denied, and he appealed, but the order denying his motion was affirmed. City of Salinas v. Luke Kow Lee, 217 Cal. 252, 18 P.(2d) 335. After the remittitur went down, this plaintiff commenced an action under the provisions of section 749 et seq. of the Code of Civil Procedure. This defendant appeared and answered. On the trial the plaintiff introduced evidence by which she sought to establish title (1) by adverse possession for twenty years, and (2) by virtue

of the judgment in *City of Salinas v. Luke Kow Lee*, supra. The trial court made findings in favor of the plaintiff. It did not find that the plaintiff established title by adverse possession for twenty years, but that she did establish title by adverse possession for five years.

[1, 2] We will take up first her claim of title as by adverse possession. She commenced this action on December 29, 1933. At the sheriff's sale the property was sold to C. W. Stanfield and was by him conveyed to A. H. Bordges. On August 24, 1928, Bordges conveyed to Collin H. Dong. From that date on there is evidence of adverse possession by the plaintiff and her grantors for a period exceeding five years, and a full compliance with the law. *Montgomery & Mullen Lumber Co. v. Quimby*, 164 Cal. 250, 128 P. 402.

But the defendant asserts the plaintiff's possession was interrupted. She points to the unsuccessful attempt on the part of the defendant to set aside the sale made by the sheriff in the foreclosure proceedings. *City of Salinas v. Luke Kow Lee*, supra. The point may not be sustained. The defendant cites and relies on *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 P. 645, 20 Am. St. Rep. 217, and *Armstrong v. Payne*, 188 Cal. 585, 206 P. 638. Neither case is controlling. In both cases a prescriptive title to the use of waters was involved. The law on that subject is not necessarily the same as the law applicable to a claim of title by an adverse possession of a tract of land. 1 Cal. Jur., pp. 522 and 597. Again, in neither case was the element of unsuccessful litigation involved. In 2 C. J. 109, the rule is stated as follows: "While it is the rule in some jurisdictions that the mere bringing of suit against the adverse claimant breaks the continuity of possession, the decided weight of authority is that an unsuccessful action leading to no change of possession does not arrest the running of the statute of limitations, and this is true whether the action is prosecuted to judgment or compromised, or whether the suit is voluntarily abandoned or dismissed for want of prosecution." In *Langford v. Poppe*, 56 Cal. 73, at page 76, the court said: "The acquisition of a right by adverse possession depends upon the adverse holding of the person claiming the right, and not simply upon the acts of one claiming a paramount title, who has been in a position to assert his title

during the statutory period. The dismissal of defendant's action of ejectment terminated his right to claim anything by the virtue of that action; and the facts that plaintiff and his predecessors contested the action, and refused to surrender the possession, only tend to prove that their possession was *adverse*." (Italics by the court.) In *Breon v. Robrecht*, 118 Cal. 469, at page 470, 50 P. 689, 51 P. 33, 62 Am. St. Rep. 247, the court said: "It is true that the mere commencement of an action of ejectment, which is afterward dismissed, does not disturb an adverse possession." See, also, *Cobe v. Crane*, 173 Cal. 116, 159 P. 587. We think it is clear that the foregoing cases show the rule obtaining in this state is the same as that delineated in 2 C. J. 109, as quoted above. True it is that in the cases which we have cited the unsuccessful litigation consisted of actions in ejectment, whereas, in the instant case, the litigation consisted of motions made in a pending proceeding, the foreclosure action. But the distinction does not help this defendant.

[3] The defendant complains because the trial court, over his objection and exception, admitted in evidence the deed from the sheriff to A. H. Bordges. He claims that said deed was void on its face. If the record showed that the plaintiff entered under that deed the point might have some merit. *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280. But she did not do so. She entered under a deed from C. H. Dong which was properly admitted in evidence and to which no objection was made. The latter deed showed color of title. *Packard v. Moss*, 68 Cal. 123, 129, 8 P. 818. It follows that the ruling admitting the Bordges deed was immaterial. This is so because under the theory of title by adverse possession, the plaintiff was not bound to produce evidence of a record title. It follows that the trial court did not err in entering its judgment based on the claim to adverse possession. That being so, it is not necessary to discuss any of the points made by the defendant regarding the invalidity of the judgment in the case of the *City of Salinas v. Luke Kow Lee*, supra.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

WILSON v. STOCKHOLDERS' PUB. CO.,
Inc., et al. *
Civ. 10253.

District Court of Appeal, Second District,
Division 2, California.
May 24, 1935.

Hearing Granted by Supreme Court
July 23, 1935.

1. Libel and slander Ⓒ97

Order sustaining, without leave to amend, general demurrer to complaint, alleging publication of long articles libelous per se, merely because some of the allegations that statements were false were couched in conjunctive form, *held* error (Civ. Code, § 45).

2. Libel and slander Ⓒ6(2)

False statements in newspaper article, under heading that taxpayers had been "Stung" for \$75,000, that plaintiff had sold to county \$75,000 worth of impractical teletype machines which had been stored, and that county had paid \$4,357.93 as maintenance or service fee on the junked equipment so stored, *held* "libelous per se" (Civ. Code, § 45).

[Ed. Note.—For other definitions of "Libel," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action for libel by Fred J. Wilson against the Stockholders' Publishing Company, Incorporated, and another. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

Lester E. Hardy and Victor A. Gillespie, both of Los Angeles, for appellant.

Binford & Binford, by L. B. Binford, all of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in favor of the defendants after the sustaining of a general demurrer without leave to amend in an action for damages for libel. The sole question involved is whether or not the complaint states facts sufficient to constitute a cause of action.

The newspaper articles which were alleged to be libelous charged the plaintiff with having sold to the county of Los Angeles \$75,000 worth of "impractical" teletype machines, and that they were subsequently stored in the basement of the County Hospital, where they "gathered dust and cobwebs"; that thereafter, over a period of time, the plaintiff charged and collected

from the county \$4,357.93 as maintenance or service fee on the "junked equipment" so stored in the basement and "gathering dust and cobwebs." In headlines above one of the articles were the words, "L. A. Taxpayers 'Stung' For \$75,000." We go to defendants' brief to find the reasons which defendants assign for believing the complaint to be defective. These reasons are stated as follows: "First: That there was no sufficient denial of the truth of the articles complained of. * * * That allegations of falsity and denials of truth are obviously couched in artfully conjunctive form, resulting in the main in no real denials. Second: That it is the right of the court to determine, where words are not libelous per se, but if they have a possible double meaning, whether or not the innuendo and colloquium or matters of inducement pleaded are fairly sustained by the articles or whether in truth the innuendo enlarges the scope of the articles and begets the libel."

[1] With regard to the defendants' first contention, we are satisfied that as against a general demurrer without leave to amend, the denials of the truth of the articles were sufficient. Had these contentions which are now set forth in defendants' brief been urged by way of special demurrer for ambiguity, the court might well have sustained the demurrer as to some of them. But to sustain a general demurrer without leave to amend in a libel suit, where the alleged libelous articles are long, merely because some of the statements which are alleged to be false are couched in conjunctive form, does not comport with the effort which courts constantly make to try cases on the merits.

[2] The second contention of defendants is built upon the premise that the articles are not libelous per se. We are of the opinion that the articles are libelous per se. No man who cherishes his reputation in the community for honesty and integrity would want it falsely said of him that he had sold \$75,000 worth of impractical equipment to the county and after the equipment had been stored in the basement to gather dust and cobwebs that he charged the county as a maintenance and service fee the sum of \$4,357.93. Nor would he want it falsely said of him that he "stung" the taxpayers for \$75,000. On their face, the statements tend to expose the plaintiff to hatred, contempt, ridicule, and obloquy, and to cause him to be shunned and

avoided, and to injure him in his occupation. Section 45, Civil Code. The defendants admit that the article "was intended to be a definite and severe criticism of the board of supervisors." The defendants also admit "There is a 'dig' at the county—a somewhat sarcastic statement—with respect to their having paid over a period of many months or years for a service which they could have terminated at any time. * * * " There were two parties to the reported transaction, the board of supervisors on the one hand and the plaintiff on the other, and it is obvious to us that the "definite and severe criticism," the "dig," was applicable to both parties alike. For the reasons stated, the judgment must be reversed, with directions that the trial court may entertain a special demurrer or a motion to strike if the defendants desire to present them.

Judgment reversed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 226

HOSKINS et al. v. WALTERS et al.
Civ. 1197.

District Court of Appeal, Fourth District,
California.

May 28, 1935.

Appeal and error ☞786

Appeal was dismissed where notice of appeal was filed on July 26, 1932, and amended notice of appeal was filed on August 12, 1932, no request for preparation of transcript, transcript, or bill of exceptions had been filed, and on March 22, 1935, all proceedings for settlement of proposed bill of exceptions theretofore filed in trial court were terminated and dismissed.

Appeal from Superior Court, San Diego County.

Action by Eleita Hoskins and another against Alice Walters and others. From a judgment for defendants, plaintiffs appeal. On motion to dismiss appeal.

Appeal dismissed.

Sanders & Jacques, of San Diego, for appellants.

Walter F. Keen, of Los Angeles, for respondents.

JENNINGS, Justice.

Respondents, Alice Walters and Daniel E. Walters, have moved this court to dismiss the appeal herein for failure of appellants to file a transcript or bill of exceptions within the prescribed time. In support of the motion the certificate of the county clerk, as required by rule XI of the Rules for the Supreme Court and District Courts of Appeal, has been filed. There is no contradiction of the facts stated in the certificate. It appears therefrom that notice of appeal was filed on July 26, 1932, and an amended notice of appeal was filed on August 12, 1932; that no request for preparation of a transcript has been filed; that no transcript has been filed; that no bill of exceptions has been filed; that on March 22, 1935, all proceedings for the settlement of a proposed bill of exceptions theretofore filed in the trial court were terminated and dismissed by order of said court. The showing thus made is ample, and the motion must be granted.

The appeal is accordingly dismissed.

We concur: BARNARD, P. J.;
MARKS, J.



7 Cal.App.2d 292

ELECTRIC EQUIPMENT CO. v. HEINE.

MAN et al.

Civ. 9823.

District Court of Appeal, Second District,
Division 2, California.

May 31, 1935.

Hearing Denied by Supreme Court
July 30, 1935.

1. Partnership ☞243

Assets, debts, and credits of partnership, dissolved by death of one partner, remain distinct from those of its late members.

2. Partnership ☞244

On dissolution of partnership by death of one partner, surviving partner should proceed to wind up partnership's affairs, pay its debts out of partnership assets, and divide residue, if any, among those entitled thereto.

3. Partnership Ⓒ255(1)

Corporation, leasing store to executor continuing operation of business conducted by testatrix as surviving partner after co-partner's death, without knowledge of previous partnership or fictitious name under which business was operated, *held* entitled to judgment for possession of premises and unpaid rent.

4. Appeal and error Ⓒ757(1)

Statements of purported facts, not appearing in transcript of record on appeal, should not be made in briefs.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Electric Equipment Company against Herbert S. Heineman, executor of the estate of Margaret McRae, deceased, and others, in which William Prentiss, Jr., as administrator with the will annexed of deceased's estate, was substituted for the executor as a party defendant. Judgment for plaintiff, and substituted defendant appeals.

Affirmed.

V. P. Lucas, of Los Angeles, for appellant.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondent.

WILSON, Justice pro tem.

This is an appeal from a judgment in an action for unlawful detainer. A husband and wife engaged in business as partners. The husband, H. D. McRae, died, and the surviving wife, Margaret McRae, conducted the business until her death. Thereafter her executor, by leave of court, continued the operation of the business, and for that purpose leased a store from respondent on a month to month basis. Default was made in the payment of rent and this action resulted. Judgment for possession of the premises and for unpaid rent went in favor of the plaintiff and against William Prentiss, Jr., as administrator with the will annexed of the wife's estate, he having been substituted in the place of the executor after the making of the lease.

[1-3] The ground of appellant's appeal is that the assets and liabilities of the partnership remained a separate and distinct

entity after the death of the last partner, and that the court erred in rendering judgment against the estate of the last surviving partner for the rent of the premises occupied while the business was operated by the executor.

When a partnership is dissolved by the death of one of the partners, its assets, debts, and credits remain distinct from those of its late members. The surviving partner should proceed to wind up the affairs of the partnership, pay its debts out of the assets, and divide the residue, if any, among those who are entitled thereto. Here the partnership, which was carried on under the fictitious name of H. D. McRae Company, was dissolved on July 31, 1931, by the death of the husband. The surviving partner operated the business under the same name until her death on March 15, 1932, after which her executor continued to conduct the same business until May, 1933. The trial court found that the respondent had no knowledge of the previous partnership or of the fictitious name under which the business was operated. The respondent, therefore, dealt with the executor as it would have dealt with the personal representative of any other decedent, looking, as it was entitled to do, solely to the estate and its assets for payment of the rent.

The trial court did not find, as asserted by appellant, that the rent due under the lease was not a partnership liability, nor that the estate of H. D. McRae was not liable to the estate of Margaret McRae for its proportionate share of the rent, but found that the estate of Margaret McRae, through its executor, had the use of the premises, and that as between the respondent and the estate of Margaret McRae the indebtedness was that of the latter.

[4] The respondent's brief would have been of greater assistance to the court if the points had been separately stated under appropriate headings as required by rule VIII. Furthermore, statements of purported facts that do not appear in the transcript of the record should not be made in briefs. They are not only of no benefit, but actually impede the court by causing a search for nonexistent matters.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

7 Cal.App.2d 130

McALLEN v. SOUZA.

Civ. 9814.

District Court of Appeal, First District,
Division 2, California.

May 24, 1935.

Appeal and error ⇨80(4)

In administratrix' suit for accounting and to impress trust on certain funds, judgment that administratrix was entitled to accounting of defendant of all things held in trust by defendant, and that equitable division of property be made at time of accounting, and that property held by defendant be divided in described proportions, *held* not appealable "final judgment" because showing on its face that there were issues yet to be heard and determined.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Frances McAllen, as administratrix of the estate of Mary Souza, deceased, against A. T. Souza. From the judgment, defendant appeals.

Appeal dismissed.

Tinning & De Lap, of Martinez, for appellant.

Gerald F. Harrington, of Oakland, for respondent.

STURTEVANT, Justice.

As administratrix of the estate of Mary Souza, the plaintiff commenced an action against the defendant for an accounting and to impress a trust on certain funds. After hearing some of the issues, the trial court rendered a judgment which contained, among other provisions, the following:

"It is hereby ordered, adjudged and decreed that plaintiff, as administratrix of the estate of Mary Lucas Souza, deceased, is, as a result of the verbal agreement made between the said Mary Lucas Souza and the defendant that what money he made would be his, and what money she made would be hers, entitled to an accounting of the defendant of all sums of money, or things of value, now held in trust by said defendant, * * * and that a just and equitable division of all of said property be made at the time said accounting is had.

"That all of the property now held by the defendant and accumulated subsequent to the commencement of this relationship with Mary Lucas Souza be divided in such proportion as the labor, services, and cash advancement of defendant and deceased contributed to the whole."

From that judgment the defendant appealed. We think it is quite clear that the judgment was not a final judgment because it appears on the face of it that there are many issues yet to be heard and determined, that is, that there are many judicial acts yet to be done. Under such circumstances, the judgment is not final, and, except in those instances where the statute provides otherwise, an appeal may not be taken therefrom. *Hollar v. Saline Products, Inc., etc.* (Cal. Sup.) 43 P.(2d) 273, and cases there cited.

The appeal is dismissed.

We concur: **NOURSE, P. J.;**
SPENCE, J.



7 Cal.App.2d 270

LOFTON v. C. B. PERKINS NAT. AUTOMOBILE INS. CO. et al.

Civ. 10324.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1935.

Brokers ⇨4

Surety on real estate broker's bond *held* not liable for loss resulting to person who intrusted money to broker to loan on personalty by reason of broker's fraud in delivering to lender notes which were not secured by trust deed, as broker represented, since transaction was outside terms of bond required by statute (Gen. Laws 1931, Act 112).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Luna Lofton against C. B. Perkins, the National Automobile Insurance Company, and another. From a judgment for plaintiff, second-named defendant appeals.

Reversed, with instruction.

C. W. Bowers and Chas. E. R. Fulcher, both of Los Angeles, for appellant.

Garner White, of Inglewood, for respondent.

STEPHENS, Presiding Justice.

Appeal by one of the defendants National Automobile Insurance Company, a corporation. Perkins, one of the defendants, was a real estate broker, and appellant was his official bondsman under the Real Estate Brokers' Act.

Plaintiff-respondent Luna Lofton had for some time intrusted money to Perkins to loan on personalty. They agreed that two trust deed notes should be purchased. Perkins reported this as done, and delivered two promissory notes, in form of trust deed notes, but no deeds. The evidence which was stipulated in toto compels the conclusion that there never were any trust deeds, and that the transaction was fraudulent. Plaintiff unfortunately is out her money, but appellant is not obliged to pay because the transaction is outside the terms of the bond and the law requiring it. Real Estate Brokers' Act, Act 112, vol. 1. Deering's General Laws 1931, page 25. The surety is not liable where the basis of the claim is the purchase of an existing security. Layne v. Malmgren, 99 Cal. App. 742, 279 P. 670.

The judgment is reversed, and the trial court is instructed to enter judgment for defendant, who is appellant here.

I concur: CRAIL, J.



7 Cal.App.2d Supp. 757

HACKETT v. CALIFORNIA LAUNDRY

et al.

C. A. 2652.

Appellate Department, Superior Court, Los Angeles County, California.

May 24, 1935.

1. Bailment ⇨ 18(2)

Launderer held not entitled to lien on laundry which was part of furnishings of house which had been leased to tenant for

previously accrued charges against tenant, since laundry did not "belong to" tenant within statute giving launderer a lien on property "belonging to" customer (Civ. Code, § 3051).

Phrase "belonging to" means implied ownership and is equivalent to "the property of" or "owned by" the customer.

[Ed. Note.—For other definitions of "Belonging To," see Words & Phrases.]

2. Bailment ⇨ 18(2)

That tenant had authority to have furnishings in leased house laundered did not give launderer a lien on furnishings in absence of agreement giving tenant authority to have furnishings laundered on owner's credit (Civ. Code, § 3051).

Appeal from Municipal Court of City of Los Angeles; Clement D. Nye, Judge.

Action by Susan R. Hackett against the California Laundry, a corporation, and others. From the judgment, plaintiff appeals.

Reversed and remanded.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellant.

Walter H. Hewicker, of Los Angeles, for respondents.

FOX, Judge.

Plaintiff rented a furnished house to a tenant who ran up an unpaid laundry bill with defendant of \$161.33. Defendant now has in its possession several bundles of laundry which were part of the furnishings of the house and owned by the plaintiff, on which, however, it claims a lien not only for laundering these particular articles, but also for previously accrued charges against the tenant. Plaintiff brought this action to recover possession of these articles or the value thereof. Judgment was rendered giving defendant a lien for the entire unpaid account. From this judgment, plaintiff appeals.

[1] Defendant bases its claim for a lien principally upon the provisions of section 3051 of the Civil Code. The pertinent part of the section reads as follows: "Laundry proprietors and persons conducting a laundry business, have a general lien, dependent on possession, upon all personal property in their hands belonging to a customer, for the balance due them from

such customer for laundry work." It will be noted that the lien is created against personal property "belonging to" a customer. What then do these words mean? In our opinion, giving these words their natural and ordinary meaning, they are equivalent, when used to designate the legal relationship between a person and property, to "the property of" or "owned by." They imply ownership. Webster's New International Dictionary; *San Francisco v. McGovern*, 28 Cal. App. 491, 500, 501, 152 P. 980; *State Land Settlement Board v. Henderson*, 197 Cal. 470, 480, 241 P. 560; 7 Corpus Juris. 1039, 1040. Therefore, since the laundry was not owned by the customer, the asserted lien thereon is not effective against the real owner.

This conclusion finds further support in the wording of the section. In the earlier part of it, provision is made for a lien where a person "makes, alters, or repairs any article of personal property, at the request of the owner, or *legal possessor* of the property." (Italics ours.) If it had been the intention of the Legislature to give laundry proprietors a lien on personal property delivered to them by one in lawful possession which would be effective against the owner, some expression equivalent to that above italicized should have been used. The difference in the phraseology is significant and serves to negative any such legislative intention.

In interpreting another provision of this Code section, which gives a lien to livery stable proprietors on horses and stock fed or pastured by them, it was held in *Lowe v. Woods*, 100 Cal. 408, 34 P. 959, 38 Am. St. Rep. 301, that no lien was created in favor of a livery stable keeper for feeding a horse left with him by one having possession thereof under a conditional

sales contract by the terms of which title was retained by the seller until the price was paid, and that such a lien could only be created by the owner or by some one authorized to act for him.

[2] Respondent, however, argues that the tenant was the agent of the owner to have the necessary laundry work done. It bases this argument on the fact that when the owner leased the furnished house to the tenant, she knew that it would be necessary to have the furnishings laundered from time to time. It is, of course, true that the tenant had authority to have the furnishings laundered when necessary, but it does not follow that the tenant had authority to have the laundry work done for and on behalf of the owner, or on credit, in the absence of an agreement conferring such authority. Certainly the tenant had no authority to have the laundering done on the owner's credit and thereby to subject the owner's property to a lien as security therefor.

Defendant also relies on section 3051a, Civil Code, to support its claim of lien. This section does not purport to create any liens [*C. I. T. Corporation v. Biltmore Garage* (Cal. Super.) 36 P.(2d) 247], but rather to provide a procedure by which certain liens (such, for example, as those created in favor of persons who alter or repair articles of personal property at the request of the legal possessor) created under the preceding section in excess of \$100 may be made effective against the owner of the property by giving notice to the owner if his address is known.

The judgment is reversed and the cause remanded for a new trial, appellant to recover costs of appeal.

SHAW, P. J., and SCHAUER, Justice pro tem., concur.

3 Cal.2d 638

In re DEN'S ESTATE.

DEN et al. v. LUTON.

L. A. 14476.

Supreme Court of California.

May 22, 1935.

1. Executors and administrators Ⓒ315(6)

The will is only evidence upon which court passes in rendering its judgment embodied in decree of distribution, which determines and concludes rights of legatees and devisees (Probate Code, §§ 1020, 1021).

2. Executors and administrators Ⓒ37(5)

Where order granting petition for letters of administration with will annexed on ground that further administration was necessary was permitted to become final, order held conclusive as to necessity for further administration (Probate Code, § 1067).

3. Executors and administrators Ⓒ37(4)

Order granting petition for letters of administration with will annexed instead of administrator, who had resigned, to whom letters of administration with will annexed had been granted on ground that further administration was necessary, held proper under the evidence (Probate Code, § 1067).

In Bank.

Appeal from Superior Court, Santa Barbara County; H. S. Schaffer, Judge.

Petition by Alfonso L. Den and another for appointment as administrators with the will annexed of Nicholas A. Den, deceased, opposed by Carrie Bell Luton. From an order granting the petition and dismissing the contest, contestant appeals.

Affirmed.

Prior Opinion, 39 P.(2d) 418.

Heaney, Price & Postel and Clarence A. Rogers, all of Santa Barbara, for appellant.

Jerome H. Kann, of Los Angeles, and Schauer, Ryon & McMahon, of Santa Barbara, for respondents.

PER CURIAM.

This is an appeal from an order appointing Alfonso L. Den and Ysabella Den McDonald administrators with the will annexed of the estate of Nicholas A. Den, deceased, in the place and stead of administrator Richard O. Hyland, resigned, and dismissing the contest thereto instituted by the appellant, Carrie Bell Luton.

The decedent died in 1861 leaving practically all of the real and personal property owned by him to Jose Maria Hill and Charles E. Huse, as trustees, to be partitioned and administered by them as such trustees. A decree of final distribution was entered in 1875. The decree of distribution purported to distribute "any other property not now known or discovered which may belong to the estate, or in which the estate may have any interest * * * in accordance with the terms of the will," but failed to name any devisee or legatee to take any such undiscovered property. In fact, the language just quoted is qualified by the expression "as follows," after which two specific parcels of land are distributed to the trustees already mentioned. It may be added parenthetically that nowhere in the will is there a true residuary clause, and it is, to say the least, extremely doubtful if any interest in undescribed realty could have passed thereunder.

In 1921, according to the record, A. M. Ruiz petitioned for and was granted letters of administration with the will annexed for the purpose of administering on some property which it was alleged belonged to the estate, but which could only be determined by a court action. Subsequently, Ruiz died, and in 1930 Richard C. Hyland was appointed administrator with the will annexed to succeed him. In his petition Hyland alleged that there was property belonging to the estate which was unadministered, being the same property as described in the former petition of Ruiz. The court determined that the deceased left the property mentioned in the petition and that the estate was "unadministered and not closed." The record does not show that there was any opposition to the petition of Ruiz or Hyland. In March, 1933, Hyland's resignation as administrator was filed. At the same time Alfonso L. Den, a son of the decedent, and Ysabella Den McDonald, a granddaughter, petitioned for letters with the will annexed to succeed Hyland. It was to this petition that the contestant, Carrie Bell Luton, another granddaughter, filed opposition on the ground that the property in question passed under the decree of distribution in 1875, and that there was no necessity for administering it.

The essence of appellant's claim is that all of the estate of the deceased passed by

the decree of distribution, hence the probate court was without jurisdiction to appoint the respondents.

[1,2] However, sections 1020 and 1021 of the Probate Code, formerly sections 1665 and 1666 of the Code of Civil Procedure, require the court to distribute the estate to the persons entitled and to "name the persons and the proportions or parts to which each is entitled." And it is the settled law that the decree of distribution is the instrument which determines and concludes the rights of the legatees and devisees. See *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681, 63 Am. St. Rep. 145, and *Wills v. Wills*, 166 Cal. 529, 137 P. 249, 251. The last-cited case says, "Only where by apt language the will is incorporated into the decree, as in *Goldtree v. Thompson*, 79 Cal. 613, 22 P. 50, may" resort be had to the will. In other words, the will is only evidence upon which the court passes in rendering its judgment embodied in the decree. A careful scrutiny of the decree here involved discloses that no person was named to take the unknown or undiscovered property such as was the case in *Humphry v. Protestant, etc., Church*, 154 Cal. 170, 97 P. 187; *Osmont v. All Persons*, 165 Cal. 587, 133 P. 480, and *Victoria Hospital Ass'n v. All Persons*, 169 Cal. 455, 147 P. 124. In fact, if it were necessary to determine the question, we should be compelled to declare that when tested by the foregoing rules the decree here fails to include the clause ordinarily termed the omnibus clause. We do not deem such decision essential, however, for the reason that the question was submitted to the probate court upon the application of Ruiz for letters of administration, and that court concluded that the property or interest described in the petition had not passed by the decree of distribution. It would seem that the question of the necessity for further administration had been settled by the order of 1921, which was permitted to become final.

[3] Nor was the action of the trial court in this regard irregular. Section 1067 of the Probate Code provides that the final settlement of an estate shall not prevent a subsequent issuance of letters, "if other property of the estate is discovered, or if it becomes necessary or proper for any cause that letters should be again issued." While it may be said that the court should ordinarily proceed with considerable cau-

tion before declaring the necessity of reopening that which has apparently been completed and closed, yet the facts of the present situation bring it within the purpose and scope of the section.

Judgment affirmed.



3 Cal.2d 686

**TARESH v. CALIFORNIA CANNING
PEACH GROWERS.**

Sac. 4916.

Supreme Court of California.

May 27, 1935.

Sales ☞ 107

Where contract between grower and buyer, a co-operative association, provided that grower might file with buyer between February 1st and 10th written cancellation of contract, whereupon contract should be canceled as to succeeding years, grower's written notice of cancellation which reached buyer on January 30th held sufficient, particularly where it was filed, and at all times thereafter remained on file in buyer's office.

In Bank.

Appeal from Superior Court, Sutter County; J. O. Moncur, Judge.

Action by John Tares against the California Canning Peach Growers. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Rich, Weis & Carlin, of Marysville, for respondent.

THOMPSON, Justice.

The defendant appeals from a judgment entered on motion of the plaintiff for a judgment on the pleadings on the theory that the answer did not allege any defense to the action.

The appellant is a nonprofit co-operative association incorporated under the laws of California, for the declared purpose of the better handling of deciduous fruits, especially peaches, through the co-operative and joint effort of its members and the association whereby mutual advantages and

economies in the handling, shipping, and the securing of advantageous marketing facilities might result in benefit to the individual members and the association, and which benefits are dependent directly upon the performance by the members of their marketing agreements to deliver fruit grown by them to the association.

The respondent is the owner of a peach orchard of about ten acres in Sutter county, and entered into a marketing agreement with appellant association in April, 1925, to sell, and whereby the appellant agreed to buy, all of the canning peaches produced on respondent's orchard during the years 1925 to 1936 inclusive. Paragraph 18 of the contract, with the interpretation of which we are immediately concerned, is as follows:

"The Grower may file with the Buyer between February first and February tenth inclusive of each of the years 1924, 1926, 1928, 1930, 1932 and 1934 a written notice of his desire to withdraw from this contract, and the Buyer will thereupon give its written release thereof, and thereupon said contract shall be cancelled as to the succeeding years of the contract period. And the Buyer is hereby also given the right to give written notice to the Grower between March first and March tenth inclusive of either of the above named years, of its desire to withdraw from this contract, and thereupon said contract shall be cancelled as to the succeeding years of the contract period."

The respondent sent to the appellant, by registered mail, at the city of Sacramento, the following:

"Rio Oso, Cal., January 25, 1934.

"California Canning Peach Growers Association,

"San Francisco, California.

"Attention: A. D. Pogetto, Manager.

"Gentlemen:

"Please be advised that I am withdrawing my membership in the California Canning Peach Growers Association.

"Very truly yours,

"John Tares

"No. 1555."

It is admitted that this document was mailed at Sacramento January 29th and received at the office of defendant in Sacramento on January 30, 1934, and has been in the possession of defendant since that time. The answer, however, alleges that "prior to the expiration of said 10th day

of February, 1934," the defendant advised the plaintiff in writing as follows: "With reference to the request for withdrawal from membership in the Association we wish to advise that your request cannot be granted for the reason that notice of withdrawal was not filed within the proper withdrawal period. We wish to advise further that the Marketing Agreement signed with us remains in full force and effect."

The respondent took no further action in the premises, and the trial court adjudged in effect by granting the motion of respondent that respondent had complied with paragraph 18, that the contract was canceled, and that the respondent be released from his obligation under it. The only question presented is as to the correctness in law of this judgment.

We are not unmindful that such agreements are "essentially to and with all the other members of the co-operative association, and the interests of every member rest upon the same foundation" (California Canning Peach Growers v. Downey, 76 Cal. App. 1, 243 P. 679, 684), and hence it may be argued that such contracts are to be strictly construed. And yet we fail to conceive of any injury that could result to any member by the arrival of the notice on January 30th instead of February 1st. The present situation cannot be likened, as counsel argues, to a premature action, or a premature appeal, where the cause of complaint may be righted prior to the date on which the action may be begun or the appeal taken. Here the notice only related to future actions, the sale of the peaches for the ensuing years.

Aside from the fact, however, that we see no just reason for holding that the notice was ineffective, if we accede to the idea that the contract must be strictly construed, we must conclude that the notice was effective, because under the admitted facts it was on file in the records of the company from February 1st to February 10th, both inclusive. In other words, assuming that the appellant had the right to return the notice to the respondent, the day it was received or the next, yet the fact remains that it kept it in its records, and a new notice could have added nothing thereto. The rule applied in the case of *Morganthaler v. Krieg*, 101 Cal. App. 436, 281 P. 692, wherein it was held that a notice of cancellation was effective where a clause of the contract provided that an

advertiser might "do so at any time after the expiration of three months," but the notice was given after about one month's service, is pertinent here. Our conclusion is that the notice was sufficient.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.



3 Cal.2d 700

PEOPLE v. MOORE.
Cr. 3858.

Supreme Court of California.
May 28, 1935.

Homicide §257(1)

Evidence held insufficient to support conviction of assault with deadly weapon with intent to commit murder.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Lee Moore was convicted of assault with a deadly weapon with intent to commit murder, and he appeals.

Reversed.

Prior opinion, 38 P.(2d) 814.

Lloyd S. Nix, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged with the commission of an assault with a deadly weapon with intent to commit the murder of one James (Socks) McDonough. The appeal is from the judgment of conviction, before the court sitting without a jury, and from an order denying a motion for a new trial. The points made on the appeal resolve themselves into but one, viz., the sufficiency of the evidence to support the judgment.

During the hour from 6 to 7 a. m. on April 14, 1934, six shots from a revolver penetrated the body of McDonough as he was standing at or near a bar in an amusement build-

ing in Los Angeles known as the Ice Palace, and wherein a "Walkathon" contest was being conducted. Just prior to the shooting, a commotion occurred in front of the bar in which numerous persons took part and during which a bartender fled from behind the bar when pistol shots were fired. After the shooting, the victim, McDonough, was found lying on the floor near an overturned and blood-spotted table and chair at the southeast corner of the bar. Upon arriving at the scene, police officers found eight exploded shell casings within an area of eight or ten feet from the south end of the bar. Four bullets were found near the scene of the shooting. The defendant was in the Walkathon building between 12:30 and 1:30 a. m. on the morning of the shooting. At about 1:30 he left the building with a companion and no one saw him in the building after that hour. He was arrested about 10 o'clock a. m. of the same day while he was asleep in his automobile which was parked at the curb about two or three miles from the Walkathon building. The arresting officers found a .32 caliber pistol in his right-hand overcoat pocket. He admitted that he owned the revolver and claimed that he had bought it about 7:30 o'clock that morning at the resort called the Wonder Bar from one Jerry Hoffman.

Although prior to and at the time of the shooting there were a great number of people in the building and in the room that housed the bar, no one testified that he saw the shooting. The witness Levey testified that just after the shooting he saw a "tall guy" run out of a near-by exit. This description would fit Hoffman, but not the defendant. No one testified that he saw the defendant in the building or about the premises later than 1:30 o'clock on the morning in question. The victim testified he had been shot from the front, but that he did not see, and did not know, the person who shot him; that he did not know the defendant, and had never seen him until he appeared in court. The defendant testified that he did not know McDonough, had had no business or social dealings with him, and had no quarrel to settle with him. The owner and the manager of the Walkathon each testified that he saw the defendant leave the building between 12:30 and 1:30 a. m. The manager stated that he heard the shots about 6 o'clock. A bartender testified that he saw the defendant about 1 o'clock, but did not see him at the time of the shooting. The bartender who fled testified that he saw the

defendant after midnight, but did not see him at the time of the shooting. Other witnesses testified that they saw the defendant at the Wonder Bar at the time the shooting was alleged to have taken place. None of the bullets discharged at the shooting was found in the body of the victim. The foregoing appears without conflict in the record. No other evidence appears which could be said to connect the defendant with the commission of the offense, unless the following may be said to have that effect: The hospital surgeon testified that the holes in the victim's body were, in his opinion, made by either a .32 or a .38 caliber bullet. The ballistic expert of the city's police department testified that in his opinion the metal slugs found in the building near the scene of the shooting had been fired from the gun which the defendant had in his possession when he was arrested.

The trial judge was undoubtedly suspicious of the gun purchase testimony; also of the evidence in support of an alibi. He was also suspicious of the testimony with reference to what occurred at the time of the shooting. He expressed the view that the transaction had all the earmarks of a "gang feud" between persons "who live outside the law," and, in an endeavor to frustrate the law, "do not talk." This suspicion was directed to the testimony (with the exception of the expert testimony) on the part of both the prosecution and the defense witnesses. But the successful accomplishment of the purpose to cover up the real transaction cannot, of course, be deemed of itself evidence sufficient for conviction. As to the purchase of the gun, the evidence further shows, without conflict, that the defendant was in possession of a permit to carry a gun; that the gun described in the permit had been stolen from him a few days before the shooting and that he had reported the theft to the police department; that he bought the gun from the "tall guy" Hoffman for \$10 on a representation by the latter that he was in need of money. The defendant was corroborated by three witnesses as to his presence at the Wonder Bar from about 4:30 to 9 o'clock on the morning of the shooting. There was no evidence to rebut this showing on behalf of the defendant. There was therefore no evidence of the presence of the defendant in the Walkathon building at the time of the shooting and no substantial conflict in the evidence to the effect that he was elsewhere at the time. The ballistic expert testimony in this case

is not, without more, sufficient to establish proof of guilt beyond a reasonable doubt, and there is nothing more on which to base a conviction. The reluctance of the trial judge to believe the uncontradicted evidence cannot supply the deficiency. Although we may share the same suspicions entertained by him, we cannot escape the conclusion that on the record presented the evidence is insufficient to support the judgment.

The judgment and order are reversed.



3 Cal.2d 680

**RINGWALT et al. v. BANK OF AMERICA
NAT. TRUST & SAVINGS ASS'N**

et al.

S. F. 15072.

Supreme Court of California.

May 27, 1935.

Rehearing Denied June 25, 1935.

1. Executors and administrators Ⓒ315(6),
513(10)

Probate court decree, settling executor's final account and ordering final distribution, is conclusive against all persons interested in estate, including minors, after final distribution occurs and decree becomes final, though minors may move to reopen account for cause before distribution (Code Civ. Proc. § 1637).

2. Judgment Ⓒ443(1)

"Extrinsic fraud," warranting equity court in setting aside judgment or decree, consists of such fraud, practiced directly on party seeking such relief, as prevented his presentation of his entire case to court and real trial on issues involved.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words & Phrases.]

3. Executors and administrators Ⓒ315(4),
516(6)

Allegations of complaint that defendant bank, as executor, did not state in its final account depreciated value of estate's assets, consisting of its own and another bank's stock, which it failed to sell, held not to state cause of action to set aside probate court's final decree, settling such account and ordering final distribution, on ground of extrinsic fraud or negligence, in absence of allegation of anything done by bank to prevent, foreclose, or hinder proceeding to surcharge it for negligence; failure to sell stock being

manifest on face of final account and petition for distribution, as well as decree (Code Civ. Proc. § 1637).

4. Trusts ☞333

Complaint, alleging that defendant bank, as testamentary trustee, exchanged stock in certain banks for stock of defendant's parent or holding corporation, that latter stock depreciated in value because of defendant's failure to sell it, that defendant's final account failed to state the value thereof, that dividends thereon were paid from corporation's paid-in surplus, and that defendant failed to give special notice to or have guardian ad litem appointed for minor beneficiaries, held not to allege extrinsic fraud warranting court in setting aside probate court's final decree settling account (Code Civ. Proc. § 1701; Probate Code, § 1123).

5. Infants ☞80(1)

Mother of minors, to whom will, bequeathing portion of estate to bank in trust for payment of net income to her for life, directed conveyance of remainder on her death, was obligated, as their natural guardian, to see that their rights were protected by appointment of guardian ad litem, if advisable, but no such duty rested on bank.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Anna Ringwalt and another, as cotrustees under the will of Marie Louise Adams, deceased, against the Bank of America National Trust & Savings Association, as executor of the will, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Wayne M. Collins, of San Francisco, for appellants.

Louis Ferrari, W. E. Johnson, and T. J. Bricca, all of San Francisco (Keyes & Erskine, of San Francisco, of counsel), for respondents.

THOMPSON, Justice.

Judgment was entered in favor of defendants after their demurrer to the second amended complaint of plaintiff was sustained without leave to amend. Plaintiffs prosecute this appeal therefrom.

The complaint is in two counts. The first attempts to allege a cause of action against the respondent bank, as executor of the last will and testament of Marie

Louise Adams, for failure to sell assets of the estate consisting of stock in the respondent bank and the Bancitaly Corporation, which it is alleged depreciated in value during the course of administration of the estate, in the sum of \$33,211.87, and also against the individual respondents as servants and employees of the bank upon the claim that they aided and abetted in the neglect and refusal to sell. Letters were issued August 26, 1927, and distribution was ordered October 1, 1928. Five-eighths of the estate was bequeathed to the respondent bank in trust to pay to the appellant Anna Ringwalt the net income during her life, and upon her death to convey the remainder to her children, the appellants Anna Una Ringwalt, Louise Ringwalt, and Charles C. Ringwalt, minors. The allegations of this cause of action are to the effect that in its final account the bank as executor did not set forth the depreciated value of the stock, which it had neglected to sell in order to support the market price of outstanding similar shares, nor did it give the appellants, or any person as their representative notice of the hearing of the account, nor have a general or a guardian ad litem appointed for the minors; that the respondent bank resigned as trustee November 12, 1931, and appellants Anna Ringwalt and Charles C. Ringwalt were appointed in its stead; that the time for appeal from the decree has elapsed and appellants have no remedy other than an appeal to equity to set aside the final account and compel the executor to make restitution of the estate wasted. There is no allegation that the executor failed to give the statutory or legal notice of the hearing of the final account and petition for distribution. Appellants concede that it was in fact given, and also concede that no request was made for special notice as it is provided may be done.

[1] We shall dispose of the questions raised by the first count of the complaint before noticing the allegations of the second. It is immediately apparent that we must, first of all, determine whether the decree of the probate court is final and conclusive. Section 1637, Code of Civil Procedure, in effect when the account here involved was settled, the substance of which is now incorporated into section 931, Probate Code, provides that an order settling an account, when it becomes final, is conclusive against all persons interested in

the estate, except that persons under legal disability have the right to move for cause to reopen and examine the account or to proceed against the executor by action "at any time before final distribution." It is apparent from the provisions of this section that the decree is conclusive; that although the minors would have had a right to move for cause to reopen an account before final distribution, nevertheless, the Legislature has by apt terms declared the policy of the state to be that when final distribution has occurred and the decree has become final it shall be conclusive.

The appellants, while admitting such to be the result with respect to adults, argue that minors are an exception to the rule, and that as to them the decree is not conclusive. As indicated, we think the plain language of the Legislature is opposed to this contention. To even suggest that decrees settling the final account and ordering final distribution should not be conclusive as against minors opens up such a vista of uncertainties and field of possible litigation as to immediately demonstrate the wisdom of the legislative declaration. By analogy, the recent case of *Adams v. Martin*, 44 P.(2d) 572, in which we held that the final account of a guardian of an incompetent, whose letters were revoked and another guardian appointed, was conclusive, is confirmatory of the opinion we entertain here.

[2,3] We are therefore brought to the point where it is necessary to determine whether the cause of action attempted to be stated alleges facts constituting extrinsic fraud authorizing the court to set aside the decree and compel the executor to make restitution. Extrinsic fraud has been many times defined and quite recently in the case of *Caldwell v. Taylor*, 218 Cal. 471, 23 P.(2d) 758, 760, 88 A. L. R. 1194, we had occasion to refer to the definition contained in the leading case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, to the effect that it consists of some "fraud practiced directly upon the party seeking relief against the judgment or decree" by which "that party has been prevented from presenting all of his case to the court." And we also set forth a succinct statement from *Clavey v. Loney*, 80 Cal. App. 20, 251 P. 232, as follows: "The extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such

fraud as prevents a real trial upon the issues involved in the case, like conduct which prevents the injured party from receiving notice of the action, or which causes the absence of necessary witnesses." When scrutinized in the light of these declarations, it will be seen that the allegations of the first cause of action fail to bring it within the doctrine which equity says warrants it in overthrowing the rule which upholds and maintains the sanctity of judgments. The fact that the executor had not sold the stock was manifest, in the usual course of things, on the face of the final account and petition for distribution as well as in the decree of distribution. If it were properly surchargeable for negligence in failing to sell or for failure to sell, that issue should have been heard at the time, but we fail to discover in the allegations of appellants anything done by the respondent bank to prevent, foreclose, or hinder such a proceeding.

[4] When we turn to the second cause of action, we are confronted by substantially the same situation, the principal differences in the allegations being that the trustee exchanged Bancitaly Corporation and Bank of Italy National Trust & Savings Association stock for capital stock, for equivalent shares, of the Transamerica Corporation, which latter corporation it is alleged has at all times been the parent or holding corporation of the respondent; that stock dividends received were sold and the proceeds turned over to appellant Anna Ringwalt, but that such stock dividends were not paid out of its revenue surplus, but out of paid-in surplus; and that by reason of its failure to sell the capital stock it has depreciated in value \$53,693.75, and that by reason of such subsidence in values the appellant Anna Ringwalt has been deprived of income to the extent of \$10,000. It further appears that the trustee filed four separate accounts, all of which were approved, the final account having been settled by the court on December 9, 1931. As in the first count, the appellants rely upon the failure of the accounts to set forth the value of the shares and that the stock dividends were paid out of paid-in surplus, together with the failure to give special notice or have a guardian ad litem appointed for the minors, as constituting the alleged fraudulent conduct of the trustee. It is not asserted that the accounts failed to show the exchange of stock, nor is it averred that anything was

done to prevent the beneficiaries from contesting the accounts or obtaining all the information available to the trustee.

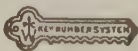
Section 1701, Code of Civil Procedure, provided, as does section 1123 of the Probate Code, that the decree of the court settling an account, when it becomes final, is conclusive upon all parties interested in the estate, the latter section very clearly indicating the legislative intent by concluding with the words: "Whether or not they are in being." In *Security-First Nat. Bank v. Superior Court*, 1 Cal.(2d) 749, 37 P.(2d) 69, where many of the authorities are cited, we concluded in accordance with the sections mentioned.

We are therefore brought to the place where the question which was answered with respect to the first cause of action must be determined. Have the appellants alleged a case of extrinsic fraud? We think the answer must be the same. In both instances the proceeding was one in rem. The constructive notice was to all interested persons, and nothing incumbent upon the respondent was left undone.

[5] We think the opinion should not be closed without some reference to the fact that the mother of the appealing minors, and their natural guardian, was at all times under the most solemn obligation to see that their rights were protected. *Sohler v. Sohler*, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98. If the appointment of a guardian ad litem for them was advisable, it can hardly be imagined that the court would have refused her request in this particular. But we know of no like duty resting upon the respondent.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.



3 Cal.2d 721

CROSSETT v. SOUZA et al.

Sac. 4879.

Supreme Court of California.

May 29, 1935.

1. Easements **↪36(3)**

Evidence as to adverse user of right of way for more than five years by adjoining

landowners held to support finding that easement existed.

2. Trial **↪54(2)**

Document, to which wife of owner claiming right of way in adjoining land signed husband's name without authority, asking for privilege of crossing adjoining land, was evidence that user was permissive only so far as wife was concerned.

3. Easements **↪36(3)**

Evidence as to traveled width of road and number of places available for vehicles to pass held to support finding that right of way created by adverse user was 15 feet wide.

In Bank.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by W. I. Crossett against J. J. Souza and others, wherein defendants filed a cross-complaint. From a judgment for defendants on cross-complaint, plaintiff appeals.

Affirmed.

J. S. Hutchinson, of San Francisco, and F. A. Meyer, of Petaluma, for appellant.

Barrett & McConnell, of Santa Rosa, and F. L. Manker, for respondent.

THOMPSON, Justice.

This action was commenced for the purpose of quieting plaintiff's title to four and three-quarters acres of land near Occidental, Sonoma county—and in particular against the claims of defendants to a right of way across the same. The defendants interposed a cross-complaint setting forth their claims to the right of way, but not otherwise contesting the ownership of plaintiff. Judgment was rendered in favor of defendants, decreeing them to be the owner of an easement of a right of way 15 feet wide across the lands of plaintiff. This appeal from the judgment is prosecuted by the plaintiff.

Responsive to the issues framed by the pleadings, the trial judge made findings to the effect that for more than five years prior to the commencement of the action the defendants and their predecessors in interest had traveled over the right of way (which is specifically described) "with horses, vehicles and on foot * * * continuously, openly, notoriously, peaceably, uninterruptedly, under claim of right and adversely to the plaintiff and his gran-

tors * * * as a means of ingress and egress to their own property adjoining that of plaintiff, and were by reason thereof the owners of an easement therefor. It is immediately obvious that the real question on this appeal is whether the evidence supports the findings. It will be sufficient, therefore, if we set down the evidence adduced by the defendants to sustain their claims. It appears that prior to 1910 the road was in use and has been used regularly, except for the interruptions hereafter noted, since that time by neighbors, deliverymen and others. In fact, the southerly portion of the road, it was testified, had been in use for forty years prior to the trial, but the location of the northerly portion had been changed—apparently prior to 1910. Those using the way graded the road occasionally with the county grader (from 1924 to 1928 every year), and graveled it to some extent. In 1911 A. D. Bush and his family lived on the Souza property and traveled the road, and later another Bush family. Then in 1920 and 1921 a family named Taduccis did the same, and following them the second Bush family again. The testimony also discloses that while there were two other roads leading to the Souza property, they were difficult of passage, and in fact impassable to automobiles during the rainy season, as a result of which all the neighbors used the Crossett road exclusively in the winter-time. The respondents purchased their property April 12, 1924, and occupied it almost immediately. They used the road in question continuously except for the interruptions, if they can be called such, we will now mention. In October or November, 1928, plaintiff erected iron gates at each end of the road, but did not lock them. About September of that year appellant called on Mrs. Souza, her husband not being at home, by reason of his employment with the Northwestern Pacific Railroad, and induced her to sign the name of her husband to a paper requesting the privilege of passing across appellant's property, and agreeing to pay \$1 for the right for the period of one year from date. The testimony discloses that she never said anything concerning the incident to her husband, and that he did not know anything about it or authorize her to enter into any such arrangement. The gates, however, were not locked until some time in October or November, 1929. After Mrs. Souza and some other ladies protested the locking thereof, she was given a key, which her husband

advised her to throw away. It is somewhat doubtful how long they remained locked, but Mrs. Souza testified it was about two months. However, she further added that when the neighbors wanted to go through they simply removed a small picket which permitted the chain which was locked to be lifted over the post and the gate to be opened. The other respondent says that he was not prevented from passing over the road at any time for more than twelve hours, although he was working away from home a good deal. The plaintiff testified that the locked gate was gone in about a month. Subsequently, and in 1930, ditches were dug across each end of the road and trees felled, but Mrs. Souza, with the aid of the school children, almost immediately filled up the ditches and she and a young man sawed up the trees within a couple of hours after they obstructed the road. Posts placed during 1931 in the road at each end remained in place not to exceed two days according to appellant's testimony, but not any appreciable time according to other testimony.

[1,2] It is apparent from the recital of the supporting testimony that the user was so continuous and covered such a length of time and was so openly and notoriously adverse that knowledge of the claim of right will be presumed. See *Wells v. Dias*, 57 Cal. App. 670, 207 P. 913; *Pacific Gas & E. Co. v. Crockett L. & C. Co.*, 70 Cal. App. 283, 233 P. 370, and cases there cited.

Nor can it be said the court was not justified in concluding that the user was of sufficient duration. The respondents themselves as owners of the adjoining property used it for a period in excess of five years under the mentioned claim of right before the gates were locked. In so far as the document is concerned to which Mrs. Souza signed her husband's name without authority asking for the privilege of crossing appellant's land, it was evidence only so far as she is concerned that the user was permissive. The trial court passed upon its weight in determining the question of fact, and we are not permitted, nor are we inclined under the state of the record here, to interfere with that conclusion.

[3] The trial court also determined from testimony concerning the traveled width of the road, and the number of places available for vehicles to pass and all the other circumstances of the case, that the right of way was 15 feet wide. Appellant argues that because there is testimony that the

traveled portion is only 8 or 10 feet wide, that it must be confined to that limit without taking into consideration that testimony which says that vehicles can and have passed each other along the road. This is a matter which belongs especially to the trial court, and we should not attempt in view of the showing here to overthrow it.

The judgment should be, and it is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.



3 Cal.2d 489

**TULARE IRR. DIST. et al. (WRIGHT et al.,
Interveners), v. LINDSAY-STRATH-
MORE IRR. DIST.**

**LINDSAY-STRATHMORE IRR. DIST. v.
CONSOLIDATED PEOPLE'S DITCH
CO.**

Sac. 4041.

Supreme Court of California.

May 3, 1935.

Rehearing Denied May 29, 1935.

1. Waters and water courses ☞144

Constitution *held* to apply doctrine of reasonable beneficial use of water as between appropriators and riparian as well as overlying landowners (Const. art. 14, § 3, adopted Nov. 6, 1928).

2. Waters and water courses ☞152(10)

In action by riparian or overlying landowners to enjoin appropriator, trial court must determine whether plaintiffs' use of water is reasonable and beneficial and whether surplus exists, and must fix quantity required by each plaintiff (Const. art. 14, § 3, adopted Nov. 6, 1928).

3. Waters and water courses ☞144

Constitution *held* to protect riparian owner's prospective as well as actual reasonable beneficial uses as against appropriator (Const. art. 14, § 3, adopted Nov. 6, 1928).

4. Waters and water courses ☞144

Use by riparian owners of entire flow of river for subirrigation *held* not reasonable use as against appropriator (Const. art. 14, § 3, adopted Nov. 6, 1928).

5. Appeal and error ☞1107

In action to enjoin appropriation, constitutional amendment allowing only reasonable beneficial use of water *held* applicable although not adopted until after appeal was perfected (Const. art. 14, § 3, adopted Nov. 6, 1928).

6. Appeal and error ☞1107

On appeals involving injunction decrees, law prevailing when appellate court renders its opinion is applicable.

7. Constitutional law ☞211, 278(1)

Waters and water courses ☞128

Constitutional amendment passed under police power and allowing riparian or overlying landowners only reasonable beneficial use of water as against appropriator *held* not violative of due process or equal protection clauses of Federal Constitution (Const. Cal. art. 14, § 3, adopted Nov. 6, 1928; Const. U. S. Amend. 14).

8. Constitutional law ☞81

Conservation of natural resources of state is in general welfare and serves public purpose, and hence constitutes reasonable exercise of police power.

9. Waters and water courses ☞128

Statute providing that ten years' nonuse of riparian right constitutes abandonment thereof *held* unconstitutional in view of constitutional amendment protecting future as well as present reasonable beneficial use of water by riparian owner as against appropriator (St. 1919, p. 513, § 11; Const. art. 14, § 3, adopted Nov. 6, 1928).

10. Eminent domain ☞293(2)

In action by riparian owners and others to enjoin appropriation by irrigation district, district *held* entitled by means of inverse condemnation, without resort to statute, to condemn excess over reasonable beneficial needs, or even entire riparian right, of impleaded riparians who first became parties to action after public use had attached in district's favor, and also to condemn prospective reasonable beneficial uses by original riparian plaintiffs (Code Civ. Proc. § 534).

11. Eminent domain ☞293(2)

Doctrine of inverse condemnation where riparian owner brings action to enjoin water appropriator, such as irrigation district, applies only where public use has attached.

12. Waters and water courses ☞152(6)

Appropriator has burden of showing surplus from which water may be taken without injuring prior rights.

13. Waters and water courses ☞152(6)

As against new appropriator, riparian owners and prior appropriators have burden

of proving that their use of water is reasonable and beneficial (Const. art. 14, § 3, adopted Nov. 6, 1928).

14. Waters and water courses ☞152(3)

Where riparian owners and others seeking to enjoin appropriation by irrigation district seasonably brought action before district began constructing system and before public use attached, plaintiffs, who diligently prosecuted action, *held* not barred from injunction because not seeking preliminary injunction until several years after public use had attached.

15. Waters and water courses ☞152(3)

Ordinarily, filing of injunction action, as by riparian owner against irrigation district appropriating water, before district has begun work will prevent public use from attaching whether or not preliminary injunction is requested when action is filed.

16. Waters and water courses ☞152(11)

Findings that appropriators were entitled to certain number of second feet of water *held*, when read as whole, to award maximum rate of flow, and not continuous flow, as contended.

17. Waters and water courses ☞152(11)

Whenever possible, quantity of water to which each appropriator is entitled should be fixed with certainty.

18. Waters and water courses ☞152(12)

Where flow of river was highly variable, awarding water to appropriators in second feet *held* not reversible error, although on retrial award should preferably be made in second feet with ultimate limitation in acre feet.

19. Waters and water courses ☞143

Appropriator is entitled, as against subsequent appropriator, to continued flow to head of ditch of quantity of water which, whenever present, has been reasonably diverted by him for beneficial uses, plus reasonable conveyance loss (Const. art. 14, § 3, adopted Nov. 6, 1928).

20. Waters and water courses ☞144

Excessive diversion of water cannot be deemed diversion for beneficial use, and hence is taking without right and confers no title on subsequent as against prior appropriator no matter how long continued (Const. art. 14, § 3, adopted Nov. 6, 1928).

21. Waters and water courses ☞144

In determining reasonable quantity of water for beneficial use of appropriator as against subsequent appropriator, policy of state is to require within reasonable limits greatest duty from state's waters.

22. Waters and water courses ☞144

Appropriator is entitled as against subsequent appropriator to use water reasonably according to custom of locality unless involving unnecessary waste, and cannot be compelled to divert according to most scientific method.

23. Waters and water courses ☞152(1)

Appropriator's action to enjoin subsequent appropriator is in effect one to quiet title of prior appropriator, who has burden of proving by preponderance of evidence every element of right claimed.

24. Waters and water courses ☞152(6)

Appropriator's long continued use of definite quantity of water may raise presumption as against subsequent appropriator that use was necessary.

25. Waters and water courses ☞152(6)

Where appropriator seeking to enjoin subsequent appropriator satisfies burden of showing that past use of water was reasonably necessary, burden shifts to subsequent appropriator to show surplus by preponderance of evidence.

26. Waters and water courses ☞152(2)

In appropriators' action to enjoin subsequent appropriator, each plaintiff must recover on strength of evidence of his own title and not on weakness of defendant's title.

27. Waters and water courses ☞152(8)

In appropriators' action to enjoin subsequent appropriator, evidence *held* insufficient to sustain findings that during particular period of each year plaintiffs as group diverted designated quantity of water and all lessor flows when available, or that quantity diverted was beneficially used, or that each plaintiff diverted for reasonable beneficial uses specific quantity of water awarded.

Evidence showed, as regards some of ditches of plaintiff appropriators, that when water was present it was used, but not how much was used; that water was not often present, especially from October to January; that some ditches never had any winter water; and that some appropriators could use more water if they had it.

28. Waters and water courses ☞152(6)

In appropriators' injunction action, subsequent appropriator did not, as contended, have burden of proving that plaintiffs had abandoned water for particular months of each year.

29. Waters and water courses ☞101

Irrigation district owning land constituting natural underground reservoir *held* entitled to extract water therefrom and to con-

vey it to distant lands for beneficial use within district, unless injuring prior rights.

30. Waters and water courses ☞142

In action to enjoin subsequent appropriator, none of plaintiff appropriators, if closing headgate for several weeks each year, should be awarded any water during any period when not using it.

31. Waters and water courses ☞144

Water used by appropriators during winter, in so far as used solely to kill gophers, squirrels, etc., *held* not devoted to beneficial use so as to confer rights as against subsequent appropriator.

32. Waters and water courses ☞142

Appropriators, if beneficially using during winter definite quantity of water when present, *held* entitled to be protected as against subsequent appropriator even though winter water was produced by infrequent rains and hence could not be estimated with certainty.

33. Waters and water courses ☞148

Appropriators in area about two-thirds of which was devoted to annual crops, and where most dependable supply from river was from spring run-off of mountain snows, *held* entitled to be protected, as against subsequent appropriator, in amount previously reasonably diverted, when present, for beneficial uses, as against contention that in any watershed where lands are surface irrigated, any diversion exceeding average yearly run-off, less margin of safety, can never be put to beneficial use.

34. Waters and water courses ☞144½

Appropriators *held* entitled as matter of law, as against subsequent appropriator, to divert by earthen ditches, and could not be compelled to build new diversion system, notwithstanding uneconomic paralleling of some of ditches; appropriators not constituting unit.

35. Waters and water courses ☞144½

Appropriator is not compelled as against subsequent appropriator to irrigate in most scientific manner.

36. Equity ☞1

Equity courts possess broad powers and should exercise them to do substantial justice.

37. Waters and water courses ☞152(11)

In appropriators' actions to enjoin subsequent appropriator, court is not limited to parties' suggestions or offers in working out physical solution, as in effecting more economic diversion or use of water, and court may make injunction subject to conditions which court suggests, and apportion cost as

justice may require, having regard to fact that prior appropriators may not be required to incur any material expense to accommodate subsequent appropriator.

38. Waters and water courses ☞150

In appropriators' action to enjoin subsequent appropriator, whose pumping of underground waters allegedly caused lowering of underground water table, defendant's offer to construct impervious by-pass carrying some of waters of river over cone of depression created by pumping *held* inadequate because not covering entire cone nor providing properly for injury to certain diversion ditches, and because disregarding induced seepage.

39. Waters and water courses ☞152(11)

In actions to determine water rights, court in working out physical solution may properly avail itself of facilities of state water commission under statute (St. 1931, p. 2421, § 24).

40. Waters and water courses ☞152(6)

In appropriators' action to enjoin subsequent appropriator, each plaintiff had burden of proving times when water was actually diverted by such appropriator.

On Petition for Rehearing.

41. Appeal and error ☞1178(6)

Where plaintiffs' evidence overwhelmingly supported certain findings, appellate court should not require plaintiffs to re-establish matters covered thereby, and hence should limit new trial so as to exclude such matters, and could properly affirm portions of judgment based on findings so supported.

In Bank.

Appeal from Superior Court, Tulare County; Albert Lee Stephens, Judge.

Action by the Tulare Irrigation District, the Consolidated People's Ditch Company, the Elk Bayou Ditch Company, and others, wherein H. E. Wright and others intervened, against the Lindsay-Strathmore Irrigation District, which filed a cross-complaint against the named plaintiffs other than the plaintiff first named. From an adverse judgment, defendant appeals.

Modified in part, affirmed in part, reversed in part, and remanded with directions.

Sloss & Ackerman, Sloss & Turner, and Sloss, Turner & Finney, all of San Francisco, Power & McFadzean and Power, McFadzean & Crowe, all of Visalia, W.

G. Irving, of Riverside, and Guy Knupp, of Los Angeles, for appellant.

W. R. Bailey and Farnsworth, Burke & Maddox, all of Visalia, W. A. Gray, H. Scott Jacobs, of Hanford, and Marietta R. Gray, for respondents.

WASTE, Chief Justice.

This action was instituted by the various plaintiffs to quiet their title as against defendant to the surface and underground waters of the Kaweah delta and to enjoin the defendant, the Lindsay-Strathmore Irrigation District, from pumping any of the water from the underground waters of the delta and transporting the same out of the Kaweah watershed to lands within the defendant district. After a protracted trial, judgment was entered in favor of all of the plaintiffs and interveners, enjoining the defendant from pumping any water from the underground waters of the delta and transporting the same to the lands of defendant district, and likewise enjoining the defendant from taking, diverting, or carrying away from the Kaweah river, or any of its branches, any quantity of water whatsoever, except that required by defendant for riparian purposes on its riparian lands located within the delta. Contemporaneously with the entering of its judgment, the trial court suspended the operation of the injunction, subject to certain conditions, pending the appeal.

The litigation here involved has been of long duration. The original complaint was filed on July 15, 1916. After issue was joined, a trial was had before Judge Wallace, sitting as a trial judge in Tulare county. After Judge Wallace had signed and filed his decision in writing (in favor of plaintiffs), defendant raised the objection that the trial judge was disqualified because of interest. In Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 P. 1056, the contentions of petitioner there (defendant here) were sustained, and a writ of prohibition was issued restraining Judge Wallace from taking any further action in the case, and ordering a new trial. The case again proceeded to trial, this time before Judge Albert Lee Stephens. During the course of this trial, consuming over 200 court days, a reporter's transcript of 56 volumes, containing 26,936 pages, was compiled, and some 678 exhibits were introduced. The findings of fact and conclusions of law,

covering 236 pages of the clerk's transcript, were filed May 16, 1925, and judgment was thereafter rendered on April 13, 1926, in favor of plaintiffs and interveners. Counsel consumed over five years in the preparation of briefs, which, without their accompanying supplements, total 1,957 pages. Now, some 18 years after the action was commenced, the case comes before this court for the first time on its merits.

The case was rendered very complex for the reason that respondents are many in number and own, or claim to own, a variety of water rights on approximately 200,000 acres of land. Some of the respondents are appropriators, some are riparian owners, and some are owners of overlying land, owning or claiming to own underground water rights. Sixteen of the respondents are corporations distributing appropriated water to their hundreds of stockholders; 1 respondent is an irrigation district, also distributing appropriated water to its landowners; 30 are individual appropriators, alleged to hold rights in the water as tenants in common; and 13 claim both as riparian owners and overlying landowners. Different questions of law were presented to the trial court and are now presented here, in reference to each class of respondent. Moreover, since the action is one to quiet each plaintiff's title to the water as against defendant, different questions of fact are presented as to each plaintiff.

As opposed to these respondents, there is but one defendant and appellant, the Lindsay-Strathmore Irrigation District. Its main lands are located outside the delta proper, and most of the lands within the district are slightly higher than the lands of respondents. It is a public corporation, organized in 1915, under the Irrigation District Act of 1897 and amendments thereto. St. 1897, p. 254, as amended. It owns a large ranch designated as the Rancho de Kaweah, located on the Kaweah delta, and partially riparian to the Kaweah river. It desires, by means of wells and pumping plants, to pump from the waters underlying this ranch 25,000-acre-feet of water yearly, and to transport and use this appropriated water for irrigation purposes on farm lands within the district some 12 miles away.

At the threshold of this case, two admitted facts stand out which are of paramount importance:

1. The rights of appellant, as riparian owner of the Rancho de Kaweah, are not involved on this appeal. The rights of appellant, as such riparian owner, were admittedly protected by the judgment of the lower court.

2. No question of priority between respondent appropriators and appellant is presented. Appellant has conceded at all stages in this controversy that, whatever the rights of respondent appropriators may be, such rights are prior in time and, therefore, paramount to any right of appellant to take water by means of appropriation for use on lands within the district and not riparian to the Kaweah river. Appellant does strenuously contend, as will hereafter appear, that the amount of water heretofore used by these respondent appropriators has not been all put to beneficial uses, but it expressly admits that respondent appropriators have a claim prior in time and right to any right of appellant as an appropriator to whatever quantity respondents prior to 1916 put to a beneficial use.

The Kaweah river is a natural water course having its source in the western slope of the Sierra Nevada Mountains in the eastern part of the county of Tulare. This river flows down the mountain slopes, through Tulare county, in a southwesterly direction, to a point in the valley known as McKay Point. At this point, the Kaweah river divides into two channels. The northerly channel from McKay Point westerly, for a distance of about 22 miles, is known as the St. Johns river and, thereafter, is known as Cross creek. The southerly channel, from McKay Point westerly for a distance of about 9 miles, is known as the Kaweah or Lower Kaweah river (which for the sake of clarity, will hereafter in this opinion be referred to as the Lower Kaweah river) and, thereafter is known as Mill creek. The waters of the Kaweah river, for many years, and in accordance with the judgment of the court in an action to which appellant was not a party, have been divided by the plaintiff ditch companies and by the plaintiff Tulare Irrigation District and others, not including appellant, by means of a concrete weir located at such point, by means of which the flow of the Kaweah river is evenly divided so that one-half the waters thereof flow down the St. Johns river and one-half down the Lower Kaweah river, except that when

the water in the Kaweah river at McKay Point decreases to 80 cubic feet per second after the snow run off of each year, then all the water is turned down the channel of the Lower Kaweah river and continues entirely to flow down that channel until the 1st day of October, and, thereafter, until the quantity at McKay Point exceeds 80 cubic feet per second, when it is again evenly divided.

The Kaweah river has all of the characteristics of streams that have their source in the high Sierra Nevada Mountains. Its principal supply is derived from the snows which fall in the high altitudes during the winter months and then, by a process of melting and freezing, are compacted in the form of ice and snow crust and so remain until melted by the warm suns of the spring and early summer months. The winter supply of water in the river is derived principally from rains which fall at intervals in the foothills and upon the valley floor. Above McKay Point, the Kaweah river drains an area of about 600 square miles of the western slopes of the Sierra Nevada Mountains, which area forms a separate and distinct watershed. As might be expected from such a stream, the surface flow is extremely variable. The court found that the flow of the river "varies greatly in amount of flow and in rate of flow from year to year, from season to season, from day to day, and from hour to hour." This finding is amply supported by the evidence and all the parties to this appeal concede it to be true.

From McKay Point, extending westerly and southwesterly therefrom, and comprising a portion of the floor of the San Joaquin Valley, there exists an alluvial fan or delta built up through the years by the Kaweah river. This Kaweah delta comprises in all more than 300,000 acres, and it is on this delta that the lands irrigated by the various respondents are located.

The delta is generally triangular in shape, having its apex at McKay Point, and sloping gradually downward from McKay Point. About 7 miles westerly from McKay Point there are certain small mountains known as the Venice Hills, which control the course of both branches of the Kaweah river westerly from McKay Point. These hills divide the delta into two parts. That portion of the delta lying east of the Venice Hills is known as the basin, containing 7,200 acres. The alluvium therein is of a sandy and porous

nature, extending to bedrock and varying from 100 to in excess of 400 feet in depth. Appellant's ranch, the Rancho de Kaweah, upon which are located the wells from which it secures the water, the transportation of which away from the rancho caused this action to be brought, is located in the basin, about 5 miles westerly from McKay Point. As already stated, the rancho is in part riparian to the Lower Kaweah river, extending on both sides thereof.

The St. Johns river, the northerly branch of the Kaweah river, passes westerly from McKay Point along or near the northerly boundary of the basin and leaves the basin through an opening in the Venice Hills known as St. Johns Gap. The Lower Kaweah river passes in a southwesterly direction from McKay Point along or near the southerly boundary of the basin to what is known as the Kaweah gap, between the Venice Hills and the so-called red lands to the south. That portion of the Kaweah delta lying westerly from the Venice Hills is called the Lower Kaweah delta. It is of a minimum width of slightly more than 2 miles immediately below the gaps in the Venice Hills, and then widens rapidly westward beyond the west boundary of Tulare county and ultimately merges into the delta of the Kings river. Upon the Lower Kaweah delta are located the towns of Visalia and Tulare, and other towns and thousands of farms, and it is on this portion of the delta that the major portion of the lands irrigated by respondents is located. The soils of the delta are sandy and highly porous, and extend to great depths before bedrock is encountered. The soils are highly fertile and the lands therein are intensely farmed. The lands adjoining the delta on the southeast and on the north are composed largely of adobe and clay, referred to by the witnesses as "red lands," through which water will not percolate readily. These red lands effectually prevent any material percolation of the underground waters off the delta in the directions mentioned.

The Lower Kaweah delta is not only traversed by the St. Johns and Lower Kaweah rivers, but also almost its entire area is covered with a network of streams, canals, sloughs, and ditches, by means of which the water is carried to the lands irrigated. The underground water level has always been high, the delta constituting a huge underground reservoir. The trial court found that these underground waters are diffused percolating waters which extend "downward from a few feet of the

ground surface to a great depth and many miles in width, moving generally with the surface slope and at right angles to the surface contours of the delta at various depths beneath the surface of the said delta."

The court likewise found that prior to 1918 the underground water table in the major portion of the Lower Kaweah delta had been falling to an extent sufficient to increase substantially the cost and difficulty of pumping water therefrom for use on overlying lands. The prevailing crops on the delta are alfalfa, fruit trees, timber, grain, field crops, and other agricultural products. An appreciable portion of the delta is devoted to wild pasture. All of the respondents use the huge underground reservoir either for direct irrigation by means of wells and pumping plants or for the support of the rivers or for subirrigation.

The appellant, as already pointed out, is an irrigation district, organized in 1915. The lands included within the district proper are almost due south from McKay Point and some 12 to 15 miles therefrom. The district has a surface area of about 16,000 acres and its lands are entirely within Tulare county. All of the lands within the district are susceptible to irrigation, and over 14,000 acres are suitable for the growing of oranges and other citrus fruits, which is the principal crop grown thereon. In 1916, when this action was commenced, landowners within the district had approximately 6,000 acres planted in citrus fruits and, since the action was commenced and up until the present trial, in spite of the dispute over their claim to water, landowners within the district have planted an additional 3,000 acres in citrus trees of various kinds. Citrus fruits, in the district in question, cannot be grown successfully without the use of water for irrigation. Because of the tremendous increase in the use of the water within the district, its water supply began to fail as early as 1913. The trial court found that although underneath the lands of the district there is an underground body of water, the use of the same for irrigation purposes by the district has caused an excessive drain thereon, so that the water pumped from a majority of the wells in the district is now heavily impregnated with salt, and that such body of water is inadequate for the reasonable needs of the landowners within the district; that there is no supply of water available within the district which is adequate for the needs of the landowners therein; "that it is necessary in order to prevent the majority of the trees and fruits

and grasses growing on the lands within said district from withering and dying, and to prevent the major portions of said lands from becoming arid and useful only for dry farming, for the said District to have a supply of water conveyed to the lands within said District from some source outside of and away from said District." The court also found that if the lands within the district be deprived of water, the citrus trees growing thereon will die; that the lands within the district planted to citrus trees "are of the reasonable value on the average of approximately twelve hundred and fifty dollars per acre; that the said lands without water for irrigation would not exceed fifty and no/100 (\$50.00) Dollars per acre in value."

Faced with the necessity of securing outside and necessary water, the landowners organized the defendant district in 1915. Immediately thereafter the district purchased the Rancho de Kaweah, located in that portion of the delta known as the basin. In addition to its underground supply, the rancho in part is riparian to the Lower Kaweah river and is upstream from most of the lands of respondents, and upstream from most but not all of the points of diversion used by respondents. After the purchase of the rancho, the district started the boring of wells thereon for the purpose of tapping the underground waters of the basin. Over a period of time, some 39 wells were drilled and electric pumps installed therein. These pumps and wells were then connected with a general irrigation system consisting of 9 miles of banded wood stave pipe; $6\frac{1}{2}$ miles of 48-inch continuous wood stave pipe; 12 miles of concrete-lined ditches; 85 miles of riveted steel pressure pipe and 2 high head pumping plants. The total irrigation system cost \$1,600,000. This system was designed to pump from the waters underlying the rancho 25,000-acre feet annually and to carry a maximum head of 75 cubic feet of water per second. The district did not begin actual pumping operations on the rancho for use within the district until 1918. During the period 1918 to the time of trial in 1922, the district pumped between 13,000 and 15,000-acre feet per year from the rancho and conveyed the same to its landowners within the district for irrigation purposes. Under the terms of the stay order issued by the trial court pending this appeal, the validity of which has been upheld (*Tulare Irrigation District v. Superior Court*, 197 Cal. 649, 242 P. 725), the appellant has been permitted to pump from the

rancho each year the quantity of water provided for in the stay order, subject to the conditions therein imposed.

The trial court found that the pumping by defendant of any portion of the waters underlying the rancho and the transportation of such waters away from the delta has injured the respondents and that each of the respondents, if such pumping continues, will be deprived of the benefit of the waters for a portion of each year for the purposes that the respondents are entitled to use the water. The trial court also found that not only will defendant's pumping diminish the underground water supply but, by induced seepage, will also diminish the surface flow of the Lower Kaweah and the St. Johns rivers.

Some word should now be said of each class of respondent. The Tulare Irrigation District, and 15 other of the plaintiff corporations, have rights as appropriators below McKay Point, some from the St. Johns and some from the Lower Kaweah river, and some from both. These respondents have exercised their rights of appropriation for many years prior to the commencement of this action. Their rights admittedly long antedate any right of defendant to appropriate water. In fixing the appropriative right of each respondent appropriator, the trial court divided the year into two six-month periods—period No. 1 from February 1 to July 31, and period No. 2 from August 1 to January 31. In fixing the appropriative right of each of the respondent appropriators in each of these periods, the trial court did not award a specific quantity of water but used as its unit of measure cubic feet per second, that is, rate of flow. The total of the appropriations found to be possessed by all of the respondent appropriators for the first period is 2,000 cubic feet per second, and, for the second period, 1,000 cubic feet per second.

The second group of respondents consists of the riparian owners along both rivers and their branches. The trial court found that the lands of these riparian owners are agricultural in character and require a *reasonable* quantity of the waters of the stream to which they are riparian for irrigation purposes and the *whole of the underground* flow to moisten their lands from beneath. The trial court did not fix the amount in quantity or rate of flow reasonably required by the respective riparians for irrigation or other beneficial purposes.

In addition to the original riparian plaintiffs, a group of riparian owners also came

into the case by way of intervention, the complaint in intervention being filed in 1920. Appellant has settled its differences with some of the riparians, and particularly with the interveners, pending this appeal.

The third group of respondents consists of overlying landowners. With the exception of two of this group—Morphew and Thomas Jacob—the lands of these parties are situated in the Lower Kaweah delta, west of the Venice Hills. The trial court found that the water underlying the lands of these parties (other than the Jacobs) does not extend under the Rancho de Kaweah and expressly found that the water underlying the rancho and the lands of these respondents did not constitute a common supply. Pending this appeal, the appellant has entered into an agreement with one of the principal overlying owners, the Mineral King Fruit Company, the exact nature of which will be discussed later. The overlying lands of Morphew and Thomas Jacob are situate in the basin. The trial court found that the waters underlying the Jacobs' lands and the waters underlying the Rancho de Kaweah constitute a common source of supply. Apparently, however, no relief was granted the Jacobs by reason of their ownership of overlying lands. The Jacobs, as are several other overlying defendants, are also riparian owners, and apparently the relief granted them was in their capacity as riparians.

Some reference should now be made to the pleadings and the issues framed thereby. The complaint describes in detail the Kaweah river and the delta built up by the water discharged therefrom; alleges that the Kaweah river during the late spring and early summer months carries more water than it does earlier and later in the year (admitted by defendant in its answer); that there are times in the year when the Lower Kaweah river has no surface flow below the head of Mill creek and the St. Johns river has no surface flow below the head of Lane slough (admitted); that certain of the creeks and sloughs leading from the Lower Kaweah and St. Johns rivers were cut out during extremely wet years by the waters of these rivers and that during every year, except extremely dry years, these designated creeks and sloughs have carried surface as well as a portion of the underground flow of the rivers (denied); that by means of the surface and underground flows of these channels the waters of the rivers have been naturally deposited and distributed up-

on the delta (denied), resulting in the nourishment of agricultural crops on many hundreds of farms on the delta; that the farmers on the delta require all of the waters of the river, both surface and underground, for the irrigation thereof, and for the moistening of said farms from below by means of the underground flow thereof, and for watering live stock, and for domestic and other beneficial uses (denied, appellant alleging that there is a huge surplus of water); that at all times during the irrigation season the underground flow of the rivers is necessary to furnish a foundation for the surface waters flowing in the channels and to hold up the underground water table beneath the surface of the lands, in order to make the same productive (denied); that any lowering of the water table during such time will diminish the productive qualities of the land and will also diminish the surface flow of the two rivers (denied); that plaintiffs for many years have used and require the use of the whole of said underground flow, including the flood waters, for the above purposes and to replenish the underground strata (denied). It should be here added that by the above allegations the plaintiffs collectively claim every drop of surface or underground or diffused percolating water in the delta. Following the above allegations, the plaintiffs next allege the rights claimed by each plaintiff appropriator, each claim being set forth in rate of flow, that is, in cubic feet of water per second. The riparian plaintiffs then describe their property and allege that each of them is entitled to the entire flow of the stream against any diminution by the defendant. The overlying plaintiffs allege that their lands are agricultural in character and require all of the underground waters for the purposes above described.

The complaint then alleges that prior to the commencement of the action defendant had bored three wells on the Rancho de Kaweah, thus tapping the underground waters of the delta, and that it threatens to drill 37 more wells and to pump therefrom a large quantity of water, and to transport and convey the same to the lands within its borders; that, such pumping will diminish not only the underground supply, but also, by induced seepage, will diminish the surface flow of the two rivers. The prayer of the complaint is that the court decree that the defendant has no right as against the plaintiffs to divert any of the water underlying the rancho to its lands,

and to enjoin the defendant from so diverting the water.

The defendant's second amended and engrossed answer denies the major allegations of the complaint, as above indicated, and also sets forth certain affirmative defenses. The main purport of the denials is to place in issue the principal question as to whether there is in the Kaweah river and in the waters underlying the delta a surplus subject to appropriation. Defendant admits its ownership of the Rancho de Kaweah and the boring of 37 wells thereon, and that starting in 1918 it had pumped therefrom and conveyed to its lands each year a designated quantity of water averaging about 14,000-acre feet per annum; alleges that this has not and will not injure any of the plaintiffs; that defendant can pump each year during the irrigation season up to 25,000-acre feet and convey the same to its lands, without injury to any of the plaintiffs; denies that the pumping has diminished or will diminish the surface flow of the St. Johns river; denies that such pumping has diminished or will substantially diminish the underground waters; denies that its pumping has affected or will affect the early surface flow of the Kaweah river; denies that its pumping has diminished or will "diminish the late surface flow of the Kaweah river in an amount at any time in excess of ten cubic feet of water per second; or in an average amount in excess of six cubic feet per second"; denies that such taking will injure any of the plaintiffs. Defendant also alleges that it is the owner of the Enlow ditch, leading out of the St. Johns river, and is entitled to divert 4 cubic feet of water per second therefrom for use on the rancho; alleges that this right is prior to any right of any of the plaintiffs.

As a separate defense against the riparian owners, defendant sought to condemn, under section 534 of the Code of Civil Procedure, all rights of the riparians above their actual needs for beneficial purposes. In this defense, it is alleged that the defendant is an irrigation district; that defendant has expended \$1,600,000 for the installation of its irrigation system; that, during each irrigation season, defendant district needs the water and has no other available supply; that it proposes to take 25,000-acre feet annually at the maximum rate of 75 cubic feet per second from the waters underlying the Rancho de Kaweah and transport the same for use on lands

within the district; that defendant can take that amount of water without interfering with the actual and necessary beneficial uses of the riparian owners; that defendant desires that the court shall fix the damages, if any, that will result to the riparians by reason of such taking.

In response to this plea, the plaintiff riparians applied to the trial court for an order bringing in additional parties, alleging that their presence was necessary for the determination of the question as to whether or not there was a surplus of water supplied by the Kaweah river in excess of that required to serve the beneficial uses or purposes of the riparian owners. In 1920 and again, the trial court, in response to this request, made its order bringing into the case as new parties a large number of persons and corporations. These persons and corporations filed their respective statements of rights denying the material allegations in defendant's defense and particularly denying the existence of a surplus over their beneficial needs.

As a second defense, defendant pleaded in its answer that in the event the court shall find that the pumping operations of defendant will diminish the surface flow of the Lower Kaweah river so as to deprive any of the plaintiffs of the water to which they are entitled, then defendant is ready, able, and willing, and it is possible and practicable for it, to construct and maintain a channel with impervious bottoms and sides whereby a portion of the flow of the Lower Kaweah river may be transported across the cone of depression caused by defendant's pumping during certain periods of the year.

The prayer of the answer is that the plaintiffs take nothing by the action; that the court decree that the defendant has the right to divert 4 cubic feet per second from the St. Johns river by means of the Enlow ditch; that the court fix the damages, if any, that will result to the riparian owners, as provided in section 534 of the Code of Civil Procedure, and that, upon the payment of such damages, if any, a final order of condemnation be made; and that defendant have judgment that it be entitled to take the quantity of water it claims, and for other and further relief.

Later, in June, 1923, defendant, after leave of court had been obtained, filed a supplemental answer setting up an additional defense, based on section 11 of the Water Commission Act. That act had

been passed in 1913 (St. 1913, pp. 1012, 1017, as amended by St. 1919, p. 513) and section 11 thereof provides that 10 years nonuse of the riparian right shall constitute an abandonment thereof. This defense was aimed solely at the riparian owners. After alleging the passage and date of the passage of the Water Commission Act, and particularly section 11 thereof, it is therein alleged that the plaintiffs W. L. Fisher, Thomas Jacob, Morpheus Jacob, William Epp, Henry Bente, G. W. King, Frank J. Brundage, W. W. Hicks, Walter Rouse, Visalia Orchard Company, and Mineral King Fruit Company have not diverted for beneficial purposes any portion of the waters of the streams to which their respective holdings are riparian for use upon their riparian lands for 10 consecutive years from and after the passage of the Water Commission Act. It is also alleged that, with the exception of Walter Rouse, all of the other named riparians have rights in plaintiff ditches sufficient for their reasonable needs; that all of the riparian plaintiffs and all of the riparians brought in by order of court pursuant to the provisions of section 534 of the Code of Civil Procedure have lost and abandoned their riparian right by virtue of 10 years nonuse of such right.

In 1920 the defendant filed a cross-complaint against two of the plaintiffs—the Consolidated People's Ditch Company and the Elk Bayou Ditch Company—alleging that the Rancho de Kaweah is riparian to the Lower Kaweah river; that these two cross-defendants were diverting water therefrom upstream from the Rancho de Kaweah 353 cubic feet per second in excess of their right, and prayed for an injunction. These cross-defendants subsequently answered, specifically denying the material allegations of the cross-complaint.

In October of 1920, certain parties secured leave of court to file, and subsequently filed, a complaint in intervention. These parties are H. E. Wright, S. E. Railsback, Gilbert H. Russell, Gordon Hall, James K. Moffitt, John E. Hooper, Willys Hall, George A. Smith, Nellie M. Smith, and Alice C. Hall. The complaint in intervention sets forth the riparian character of the lands of these parties and thereafter follows generally the allegations of the complaint. Defendant answered the complaint in intervention by allegations similar to those contained in the second amended and engrossed answer, above analyzed, and,

in addition thereto, alleged as against these parties that they were not entitled to an injunction because of the intervention of a public use. In 1923, defendant filed a supplemental answer to the complaint in intervention, based on section 11 of the Water Commission Act, alleging therein that these interveners had lost their riparian right because of ten consecutive years of nonuse.

Brief reference should be made to one other pleading. Respondent Marietta R. Gray became a party to the action by order of court made under section 534 of the Code of Civil Procedure. In place of the "Statement of Rights" provided for in that section, she filed a pleading entitled, "Complaint and Reply of Marietta R. Gray." This pleading need not be analyzed for the reason that defendant has settled its differences with this party, pending this appeal, as will hereafter appear. Sufficient it is to say that she claims as a riparian to Outside creek, alleged to be a natural water course and a tributary of the Lower Kaweah river. Defendant denied the material allegations of this pleading and, in addition, alleged the intervention of a public use as against this party.

Without going into further detail, the issues presented by these many pleadings may be summarized as follows:

1. Whether there is a surplus of water in the delta from which the defendant can pump 25,000-acre feet annually, or any other lesser amount, without injury to the prior rights of the plaintiff appropriators. A solution of this issue depends upon a determination of the quantity of water actually diverted by the plaintiff appropriators prior to 1916, and whether such amount so diverted was reasonably necessary for beneficial purposes. The main contention of appellant in this regard is that respondent appropriators have never diverted the amount found by the trial court, and that, even as to the amount actually diverted, the methods of use and methods of diversion employed by respondent appropriators are and have been wasteful. It is further contended by appellant that it is not necessary for any appropriator to divert any quantity of water at all during the winter season.

2. Whether appellant's pumping operations on the Rancho affect in any amount the surface flow of the St. Johns river, and whether such pumping affects the early seasonal flow of the Lower Kaweah river at

any time when the respondents have any use for the same.

3. Assuming, however, that appellant's pumping does diminish the flow of the Lower Kaweah river during periods of need by respondents, then the issue was presented as to the feasibility of constructing an impervious by-pass across the cone of depression created by the pumping.

4. Whether the reasonable needs of all the lands owned by the riparians, whether plaintiffs, interveners, or parties brought in under section 534 of the Code of Civil Procedure, are less than the flow of the two rivers and their tributaries. Assuming that there is an excess over the reasonable needs of all riparians, then the question is presented as to whether or not appellant is entitled to have any rights the riparians may have over such reasonable needs condemned under section 534 of the Code of Civil Procedure, or some other form of condemnation. There is also presented, in reference to the riparian parties, the question as to whether they, or any of them, have lost their riparian rights by reason of 10 years' nonuse under section 11 of the Water Commission Act.

5. Whether the interveners and Marietta R. Gray are estopped to claim the relief sought by reason of the intervention of a public use.

On the issues thus framed, the trial started on April 28, 1921, and was completed July 31, 1923. In April of 1924, the trial court rendered what appellant describes as a "memorandum opinion," not contained in the record on appeal, but mentioned here simply for purposes of continuity. As summarized by appellant, the trial court stated that in its opinion the water gathering area of the Kaweah river, supplemented by the rainfall of the valley territories, affords sufficient water in annual quantities for the uses of both plaintiffs and defendant, except in dry years, but it, the trial court, had been unable to discover any plan whereby a portion of this water might be made available to defendant and that, therefore, plaintiffs and interveners were entitled to a perpetual injunction prohibiting the defendant from pumping any water from the waters underlying the Rancho de Kaweah or from the surface waters of the Kaweah river (except the extraordinary flood waters) for transportation to and use upon the lands within defendant district. Contemporaneously with the entering of the judgment, the

trial court made and entered its order suspending the operation of the injunction, subject to conditions, pending appeal. After its motion for a new trial had been denied, defendant perfected this appeal under the provisions of section 953a of the Code of Civil Procedure.

On this appeal, appellant specifies some 75 findings as being unsupported by the evidence; specifies 4 particulars in which the judgment is alleged to be against the law; and specifies 7 other alleged errors in the judgment.

Before discussing the merits of the appeal, some mention must be made of certain compromises effected pending the appeal. On February 19, 1931, there was filed in this court a stipulation entitled "Stipulation for Modification of Judgment" by and between certain of the respondent interveners and appellant. The respondent interveners named therein are H. E. Wright, S. E. Railsback, Gilbert H. Russell, Gordon Hall, James K. Moffitt, Joseph G. Hooper, Willys Hall, George A. Smith, Nellie N. Smith, and Alice C. Hall, and constitute the entire group of interveners represented by H. Scott Jacobs, as attorney. These parties claim as owners of approximately 12,000 acres of land in Kings county, found by the trial court to be riparian to Cross creek, the continuation of the St. Johns river. The above-named parties constitute all of the interveners in the action, unless respondent Marietta R. Gray also be considered one of that group. Without recounting all the terms of the stipulation, it is therein stated that "the controversy between said Interveners and Respondents and said Defendant and Appellant has been fully settled, compromised and adjusted by agreement between said parties." The stipulation then recites the entering of the present judgment and the fact that an appeal is pending, and then recites that it is agreed that the judgment may be modified by adding certain provisions to paragraphs X and XIV of the judgment and by eliminating paragraph XX therefrom. The modifications thus provided for are to the effect that as against the named respondents appellant is entitled to divert and transport away from the Kaweah or St. Johns rivers, or any of their branches, or from the waters underlying the Rancho de Kaweah or the Kaweah delta, at such times and at such a rate as it may desire, a quantity of water in each year equal to the amount that would be produced by a continuous flow of 35 cubic

feet of water per second during the year (approximately 25,500-acre feet). The exact terms of the modification will appear in the final order of this court on this appeal.

On April 7, 1931, there was filed in this court a "Notice of Motion to Reverse Judgment in favor of Respondent, Mineral King Fruit Company." The fruit company is one of the riparian and overlying owners. The motion is based on an agreement entered into on September 2, 1930, between the fruit company and appellant. Counsel for this company have made no written objection to the granting of the motion, but during the oral argument objected solely on the grounds that they had not been consulted by their client before the agreement was made, the agreement having been entered into by the officers of their client; that their last instructions from their client were to prosecute the appeal; that they had been unable to get in touch with their client in the two days intervening between service of the motion and the oral argument; that they did not know their client's desires in the matter. The motion was then taken under submission, to be determined with the appeal on the merits, counsel being informed that they could make any objection they saw fit to the granting of the motion. Since the oral argument, counsel for respondents have filed two briefs in this case and in neither of them is any objection made to the granting of the motion. It appears, therefore, that all objections thereto have been removed.

The agreement first recites that the fruit company has sold to one Huebert certain described shares of stock, and that Huebert, in purchasing the stock, was acting as agent of appellant; that as part of the consideration for the purchase of the stock the fruit company agreed to execute the present agreement; that the fruit company is a plaintiff in this action, claiming as a riparian and overlying owner, and is also plaintiff in another described action. In consideration of the purchase from it of the stock, the fruit company agrees "that it will and it hereby does waive, surrender and release any claim that it may now or hereafter have as owner of said lands against said Lindsay-Strathmore Irrigation District for injunction or other relief, by reason of the pumping of water by said irrigation district from the lands owned or occupied by said district or the transportation of said water to the lands embraced within said district or the use of such wa-

ter thereon, or by reason of any diversion by said irrigation district of any of the waters of said Kaweah river, said St. Johns river, or said Mill creek, for use upon the lands embraced within the said irrigation district, and particularly any claim to which the said party of the first part (the fruit company) may now or hereafter have, by reason of any judgment or order made or hereafter made in either of said actions above referred to, and said party of the first part further agrees that upon the written request of the party of the second part (appellant) it will take such steps as may be necessary to cause judgment of dismissal in favor of said district in each of said actions to be entered of record in the said proceedings so far as the rights of said party of the first part are concerned. * * *" From these provisions, it is obvious that the controversy between the fruit company and appellant has been finally settled and that, as to these parties, all questions on this appeal have now become moot. The motion should, therefore, be granted and the judgment reversed as to the Mineral King Fruit Company, with instructions to the trial court to dismiss the action with prejudice to this party.

On July 1, 1932, there was filed in this court another document entitled "Stipulation for Modification of Judgment," this time affecting the rights of respondent Marietta R. Gray, another riparian and overlying party. The terms of this stipulation are almost identical with the one above discussed affecting the rights of the interveners. The terms of this stipulation will be set forth in the order of this court at the end of this opinion.

As a result of these compromises and stipulations, there is removed from the necessity of consideration the claims of a considerable number of riparian and overlying owners. However, the rights of all riparian and overlying owners have not been settled, so that the claims of those remaining must be disposed of. For purposes of convenience, the rights of the riparian and overlying respondents will be considered in this opinion before the rights of the respondent appropriators are considered.

In reference to the riparian lands, the trial court found that upon such lands, for many years, the owners thereof have grown crops of natural grasses and other feed products, also alfalfa, grain, and fruit

trees, and other agricultural products for commercial purposes; "that the said lands are agricultural in character and require and have required *a reasonable quantity of the waters* of the stream to which said lands are riparian, respectively, for the irrigation thereof, and the *whole of the underground flow* of said stream and of the Kaweah river to moisten the said land from beneath and to render it productive and to enable the owner thereof to raise such crops as he raises and is and has been accustomed to raise thereon, and for livestock to drink and for domestic and other useful and beneficial purposes to which said land is now and at all times herein mentioned and for many years last past has been devoted; that each of said riparian owners has a prior, superior and paramount right as against said defendant, *to the entire natural flow of such stream* to which the lands of such owner are riparian as aforesaid, *as against any diminution thereof by the said defendant*, except as the said Kaweah River below said McKay Point may be diminished by the riparian uses of said defendant upon its riparian lands on the said Rancho de Kaweah"; that the riparian plaintiffs do not obtain water for irrigation purposes from the canals or ditches of the plaintiff ditch companies; that it is true "that the natural flow of the stream or streams to which the lands of the plaintiffs who are riparian owners * * * as herein found, has, in each and every year since prior to the commencement of this action naturally irrigated said riparian lands and moistened the ground therein to a great and unknown extent, and thus stimulated vegetation thereon, and added to the fertility thereof, and does now naturally irrigate the same and so moisten the ground therein, and stimulate the vegetation thereon and add to the fertility thereof; and said natural flow has been and is beneficial to all of said riparian lands and to the owners thereof"; that the pumping by defendant diminishes the surface flow of both the St. Johns and Lower Kaweah rivers.

As to the overlying owners, the court found that the lands of the plaintiffs "upon which water has been and is *now being pumped from underground sources of supply*" (overlying lands) are agricultural in character, upon which the owners have for many years grown agricultural crops; that underneath the surface of the delta west of the gaps in the Venice Hills there is

"an underground body of diffused percolating water *which does not form a part of the surface or underflow of said Kaweah River or the branches thereof*, and extends downward from a few feet of the ground surface to a great depth and many miles in width, moving generally with the surface slope and at right angles to the surface contours of said Delta, at various depths beneath the surface of the said Delta; that said *underground body of water does not constitute a portion of the underflow of any river or stream.* * * *

Through the lower [Kaweah] Delta it extends downward to great depth and is drawn upon extensively by pumps for use on overlying lands. It is prevented from percolating off the Delta by impervious and tight soils of great depth, extending along the outward limits of the Delta; that from a period prior to the year 1918, and ever since said year, the underground water table within the major portion of the low Kaweah Delta has been and is falling; that the amount of lowering of said water table has been sufficient to increase substantially the cost and difficulty of pumping water therefrom for use on overlying lands; * * * that said underground body of water * * * is constantly supplied by waters sinking from the Kaweah River and its branches, and below said gaps from the underflow moving out of said basin through said gaps, and by seepage from the canals and ditches, and by the water escaping downward from the irrigation waters applied to the surface of the lands within said Delta, and to a very limited extent from small creeks draining into the Delta and from rainfall upon the Delta"; that the body of underground percolating water underlies the entire surface of the Lower Kaweah delta; "that any lowering of said water table to a depth below the reach of normal root growth of crops, except annual shallow rooted crops, or any substantial lessening of the underground flow during any time, will greatly diminish the productive qualities of said lands and diminish the quantity and quality of the crops grown thereon"; that the underground body of water when high serves to keep the surface and underflow of the river from percolating into the surrounding area, and that the higher the percolating underground water table the longer will the streams flow and the greater the quantity of water in them; that the plaintiffs do not require all of the underground body of percolating water for

beneficial uses; that the overlying owners do draw upon the underground body of water for beneficial uses; that it is not true "that said plaintiffs and interveners have used or require the use of all or any substantial portion of the extraordinary flood waters of said river to replenish the said underground flow or to supply the underground strata of said Delta below said gaps"; that "*it is not true* that each of said [overlying] lands, or any of said owners, except the said plaintiffs Thomas Jacob and Morpew Jacob, requires the whole of the underflow of said Kaweah River underneath the said lands upon which such owner has obtained water by means of pumps, for said purposes to supply water to such owner through or by means of such wells and pumping plants for his livestock to drink and for the irrigation of his said lands" and for domestic and other beneficial purposes; that Thomas Jacob and Morpew Jacob have upon their lands a well and pumping plant, by means of which, prior to and since the commencement of this action, they have pumped a quantity of water from the underground body of water underlying their lands for beneficial purposes; that said "underground supply is a portion of the underground flow of said Kaweah River * * * and constitutes a common supply for said lands * * * and the said Rancho de Kaweah"; that the lands of other overlying plaintiffs in the Lower Kaweah delta do not overlie the same source of supply as that underlying the rancho; that defendant's pumping operations have substantially diminished the quantity of water underlying the basin and have substantially diminished the surface flow of the rivers and their branches, thus diminishing the quantity available to the riparians; that the pumping operations of defendant induce seepage from both rivers, causing a loss in the surface flow of both streams; that the pumping of water from the rancho and the conveying of the same away from the basin in the amounts pumped during the pendency of the action "has diminished, and will, if continued in the future, diminish the late surface flow of the Lower Kaweah River in amounts at all times in excess of ten cubic feet of water per second, and in an average amount in excess of six cubic feet per second, and that the amount of said diminution has varied during said pumping operations from day to day and season to season, and that said operations of defendant

on various occasions and for many days diminished the late surface flow of the Lower Kaweah River to an extent in excess of forty (40) cubic feet of water per second."

[1-3] The above summary of the findings applicable to the riparian and overlying owners is not intended to be inclusive, but is here given to indicate the general trend of the findings. It is to be noticed that the trial court made no attempt to fix either in acre feet or in second feet the quantity of surface water to which the riparian owners are entitled, being content to find that such owners were entitled to "a reasonable quantity of the waters of the stream." As to the underground flow of the streams, as distinguished from the underground diffused percolating waters, the trial court found that such riparians were entitled to the "whole of the underground flow of said stream." The trial court concluded that each of the riparian owners "has a prior superior and paramount right as against said defendant to the entire natural flow of such stream * * * as against any diminution thereof by the said defendant," except for riparian uses. It is quite apparent from a reading of the findings and the judgment predicated thereon that the trial court applied the rule that a riparian as against an appropriator, whose right has not ripened into a right by prescription, is entitled to the full flow of the stream as it is wont to flow in a state of nature, without diminution by the appropriator, and that any interference with that right is an infringement of a vested property right. Stated another way, the trial court held that as between such parties the riparian and overlying owners are not limited to a reasonable beneficial use. This was the law at the time the judgment herein was entered. *Miller & Lux v. Madera, etc., Co.*, 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391; *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772. See, also, *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 P. 607, *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation*, 202 Cal. 56, 259 P. 444, 56 A. L. R. 264, rendered subsequent to the entering of judgment herein, but expounding the principles of law then existing. Since the trial of this case, the people of this state in the exercise of the police power and by constitutional amendment have changed the rule enunciated in these cases. Section 3 of article 14 of the Constitution

became effective in November of 1928. The effect of this amendment has been to modify the long standing riparian doctrine announced in the above cases, and the cases cited therein, and to apply by constitutional mandate the doctrine of reasonable use between riparian owners and appropriators, and between overlying owners and appropriators. The effect of that amendment has been so recently before this court, and has been so fully discussed in the case of *Peabody v. City of Vallejo*, 40 P.(2d) 486, that no useful purpose would be served by repeating in this opinion what was there said. See, also, *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.(2d) 5. Under this new doctrine, it is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation. If the riparian is putting the water to any reasonable beneficial uses, it is now necessary for the trial court to find expressly the quantity so required and so used. A finding, such as that in the present case to the effect that the riparian requires a "reasonable" amount for such uses, under the new doctrine, is clearly insufficient and a judgment based thereon must be reversed. The trial court, under the new doctrine, must fix the quantity required by each riparian for his actual reasonable beneficial uses, the same as it would do in the case of an appropriator. The new doctrine not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian. As to such future or prospective reasonable beneficial uses, it is quite obvious that the quantity of water so required for such uses cannot be fixed in amount until the need for such use arises. Therefore, as to such uses, the trial court in its findings and judgment, should declare such prospective uses paramount to any right of the appropriator. By such declaratory judgment, the rights

of the riparian will be fully protected against the appropriative use ripening into a right by prescription, but, until the riparian needs the water, the appropriator may use it, thus, at all times, putting all of the available water to beneficial uses. The trial court might well, by appropriate provisions in its judgment, retain jurisdiction over the cause, so that when a riparian claims the need for water, the right to which was awarded him under such a declaratory decree, the trial court may determine whether the proposed new use, under all the circumstances, is a reasonable beneficial use and, if so, the quantity required for such use.

It is to be noted that the new doctrine embodied in the constitutional amendment, as interpreted in the *Peabody Case*, not only applies the doctrine of reasonable use as between riparian and appropriator, but also as between an overlying owner and an appropriator. The overlying owner in this state has been held to have analogous rights to those of a riparian. *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, 98 P. 260. Such overlying owner is now subject to the same restrictions as those applicable to riparian owners. The doctrine of *Miller v. Bay Cities Water Co.*, supra, in so far as it held, or has been interpreted to hold, to the contrary was specifically repudiated in the *Peabody Case*, supra.

[4] From the above analysis, it follows that if the 1928 constitutional amendment is applicable to this appeal, although passed after the appeal herein was perfected, the judgment in favor of the remaining riparian and overlying owners must be reversed, with instructions to the trial court to fix such respondents' rights in accordance with the law as it now has been fixed by constitutional mandate. As already pointed out, the finding that the riparians require a "reasonable" amount of the surface flow of the stream is clearly insufficient under the new doctrine. Equally insufficient under the new doctrine, and for the same reasons, is that finding that "each of said riparian owners has a prior, superior and paramount right as against said defendant to the entire natural flow of such stream * * * as against any diminution thereof by the said defendant." This finding in the absence of a finding as to what the needs of each riparian is cannot be supported.

The further finding that each riparian requires the "whole of the underground flow of said stream * * * to moisten said land from beneath," etc., is not sufficient under the new doctrine. The use of the entire flow of a stream, surface or underground, for subirrigation cannot be held to be a reasonable use of water in an area of such need as the Kaweah delta. *Peabody v. City of Vallejo*, supra.

We now pass to a determination of the question as to whether the constitutional amendment of 1928 is applicable to the present appeal. The problem here presented differs radically from that presented in the *Peabody Case*, supra. That case, as is stated in the opinion, was not decided by the trial court until June of 1929, the constitutional amendment having become effective in November of 1928. The holding in that case that the trial court must decide the cause in accordance with the law existing when the judgment was entered is not decisive here. In the present case, the action had been tried, judgment entered, and the appeal perfected before the constitutional amendment was passed. We are, therefore, directly presented with the question as to whether, in this case, the law in existence at the time of the judgment or the law in existence at the time the appellate court decides the case should prevail.

[5, 6] The effect, on an appealed case, of a change in the law pending the appeal, has given rise to many diverse and some conflicting decisions. Aside from questions presented when rights are vested in reliance on the lower court's decision, and aside from questions presented where the new statute expressly states whether it is or is not to apply retrospectively, questions which are not here presented, on the main question as to whether the cause should be disposed of according to the law in effect at the time judgment was rendered, or to the law in effect at the time the cause is disposed of on appeal, there is a sharp diversion of authority. 4 Cor. Jur., p. 1119, § 3109; see, also, *Cooley, Constitutional Limitations* (8th Ed.) vol. 2, p. 790. California, apparently, has cases both ways. In *Hancock v. Thom*, 46 Cal. 643, and in *D. I. Nofziger Lumber Co. v. Waters*, 10 Cal. App. 89, 101 P. 38, without adequate discussion, it was held that the law in effect at the time the judgment was rendered by the lower court was controlling, while in *First National Bank v. Hen-*

derson, 101 Cal. 307, 35 P. 899, it was held that the appellate court must dispose of the case in accordance with the law existing at the time of its own decision. See, also, 2 Cal. Jur. p. 806, § 474; 2 Cal. Jur., p. 972, § 572. Whether these cases are in conflict or can be reconciled, and what the better rule may be in cases of appeals generally, need not now be decided. In the class of appeal here presented, there should be and there is no question. The present action involves an appeal from an injunction decree, which, by its very nature, acts on the rights of these parties in the future. The very nature of the proceeding was to settle for all time the rights of these parties to the waters of the Kaweah delta. It would be an idle gesture to affirm his judgment in favor of the riparian respondents, because correct when rendered, with full knowledge that it is incorrect, under existing law, and with full knowledge that, under existing law, the decree as rendered settles nothing so far as the future rights of these parties are concerned. For this reason, whatever may be the law applicable to appeals generally, the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360, the plaintiff had secured an injunction in a labor dispute. Pending the appeal, a statute was passed materially restricting the use of the injunction in such cases. The United States Supreme Court, Chief Justice Taft writing the opinion, held that the appeal must be determined under the new statute. In 257 U. S. 184, at page 201, 42 S. Ct. 72, 75, 66 L. Ed. 189, 27 A. L. R. 360, it is stated:

"The first question in the case is whether section 20 of the Clayton Act [29 USCA § 52] * * * is to be applied in this case. The act was passed while this case was pending in the Circuit Court of Appeals [238 F. 728]. In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464, 41 S. Ct. 172, 65 L. Ed. 349 [16 A. L. R. 196], a suit to restrain a secondary boycott had been brought before the passage of the act, but did not come to hearing until after its passage. It was held that because relief by injunction operates in futuro and the right to it must be determined as of the time of the hearing, section 20 of the act relating to injunctions was controlling in so far that decrees entered after its pas-

sage should conform to its provisions. [The Deering Case referred to involved the same question that was presented in the Peabody Case, supra.] The decree here appealed from in the District Court had been entered before the Clayton Act passed. But the whole cause was taken up by the appeal. The complainant had no vested right in the decree of the District Court while it was subject to review. * * * The Circuit Court of Appeals was called upon to approve or to change the decree and was obliged, therefore, to regard the new statute in its conclusion, and so are we." The same conclusion was reached by the same court in *Texas Co. v. Brown*, 258 U. S. 466, 42 S. Ct. 375, 66 L. Ed. 721. In that case, after an interlocutory decree had been entered, and pending the appeal, the state Legislature, apparently in view of the very controversy involved in the case, amended the law under which the decree had been entered. The court held that the appeal must be determined in accordance with the amended statute, stating (258 U. S. 466, page 474, 42 S. Ct. 375, 66 L. Ed. 721):

"Although passed after the decree below, this act must be given effect in deciding the appeal, since the case involves only relief by injunction, and this operates wholly in futuro."

[7, 8] The only argument made by respondents on this point is that neither the Legislature, by statute, nor the people, by constitutional amendment, has the power to abridge, modify, destroy, reduce or limit the vested riparian right and that if the 1928 constitutional amendment is intended to reach this result it deprives respondents of their property without due process of law and deprives them of the equal protection of the law in violation of the Federal Constitution. These arguments are completely answered by the reasoning found in the *Gin S. Chow* and *Peabody* Cases supra. Both of these cases hold that the amendment in question was passed under and by virtue of a reasonable exercise of the police power, and, as such, constitutes a lawful abridgment of the riparian right. That the protection and conservation of the natural resources of the state is in the general welfare and serves a public purpose, and so constitutes a reasonable exercise of the police power, is now so well settled that no further citation of authority is necessary. It, therefore, follows that no provision of the Federal Constitution has been

violated. As was said in the *Peabody Case*, 40 P.(2d) 486, page 491:

"In further clarifying the new state policy we have no hesitancy in doing so without fear of infringing upon any provision of the Federal Constitution. The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interests, to the control of local state policies. *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 702, 703, 19 S. Ct. 770, 43 L. Ed. 1136; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 356, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; *State of Connecticut v. Commonwealth of Massachusetts*, 282 U. S. 660, 670, 51 S. Ct. 286, 75 L. Ed. 602."

We, therefore, hold that the 1928 constitutional amendment is applicable to this case, and, for that reason and reasons already discussed, the judgment, in so far as it affects the various riparian and overlying respondents, whose rights have not been settled by compromise, or whose rights are not hereinafter determined, must be reversed, with instructions to the trial court to take evidence, and to find the quantity of water necessary for the reasonable beneficial uses of such respondents, and by proper judgment protect such respondents in that quantity; further, that the trial court, in accordance with the mandate in the constitutional provision, should incorporate in its decree a declaration protecting such respondents in the prospective reasonable beneficial uses of the waters here involved, unless such prospective right be condemned in accordance with the principles herein-after set forth. On such retrial, it should not be necessary for these respondents to prove the riparian nature of their respective properties, the evidence being ample to support the findings and judgment in respect thereto, and those portions of the judgment will therefore be affirmed.

[9] There are several other matters in reference to the riparian owners which must be discussed. It will be remembered that in its supplemental answer, filed over 10 years after the passage of the Water Commission Act, defendant pleaded as a special defense aimed at certain of the riparian plaintiffs, the provisions of section 11 of the Water Commission Act. The contention is that these named parties have lost their riparian right by reason of 10 years' nonuse thereof, the section in ques-

tion specifically providing that such nonuse for such period shall constitute a conclusive presumption of abandonment, and shall subject such waters to appropriation. By subsequent pleadings, the defendant raised the same defense as to all the other riparian owners. The trial court found that four of the named riparians (W. L. Fisher, Henry Bente, G. W. King, and Frank J. Brundage) had lost by such 10-year nonuse any right to divert any water from the *surface* flow of the streams, but, nevertheless, granted such four parties an injunction, evidently because it also found that all riparians, including the named four, were entitled to and used the *whole of the underflow* of the streams for sub-irrigation and to support the surface flow of the streams. For the benefit of the trial court on the retrial, it, therefore, becomes necessary to determine the legal effect of the defense predicated on section 11, and the constitutionality of that section. In so far as the section attempts to declare that 10 years' nonuse, without an intervening use, shall constitute an abandonment of the riparian right, we think the section is unconstitutional. This court, on at least three occasions, at least by dicta, has indicated its belief that the section is unconstitutional. *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 117, 252 P. 607; *Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corporation*, 202 Cal. 56, 68, 259 P. 444, 56 A. L. R. 264; *Scott v. Fruit Growers' Supply Co.*, 202 Cal. 47, 54, 258 P. 1095. More important, however, is the fact that such provision is contrary to the letter and spirit of the 1928 constitutional amendment, above discussed. That amendment, while limiting the riparian as against an appropriator, to reasonable beneficial uses, as likewise does section 11 of the Water Commission Act, expressly protects the riparian not only as to his present needs, but also as to future or prospective reasonable beneficial needs. Since this is so, it would be incongruous and in violation of the spirit of the constitutional provision to hold that 10 years' nonuse, without any intervening use giving rise to a right by prescription, constitutes a complete abandonment. Moreover, the riparian right includes, of course, not only the right to the surface flow as now limited, but also to the underground flow of the stream, subject to the limitations in the 1928 constitutional amendment. In the present case, the trial court found that every riparian was putting the underground

flow to beneficial uses. On the new trial, it will become necessary, under the new policy, to determine whether, in view of all the circumstances, such beneficial uses are reasonable. All defenses predicated on section 11 of the Water Commission Act are, therefore, removed from the case.

[10, 11] There is another matter in reference to certain of the riparian parties that must be mentioned. As already stated, as a special defense to the riparian respondents, the defendant set forth the facts required under section 534 of the Code of Civil Procedure, for the purpose of having the court, in the event that the court should find that the riparians did not require all the waters of the streams to which their lands are riparian for their reasonable beneficial uses, determine the damages such riparians would suffer by reason of the taking of the excess over such requirements. In other words, defendant sought to condemn, under the special provisions of section 534 of the Code of Civil Procedure, whatever right the riparians may have in excess of their reasonable requirements. The plaintiffs filed their respective statements of rights, as required by section 534, and impleaded numerous other persons and corporations on the ground that their presence was required in order properly to determine the questions presented. On December 11, 1920, the trial court made its order requiring these persons and corporations to appear in the action. In response to this order, many of those named appeared and filed statements of their rights. On April 12, 1923, another order was made bringing in additional parties. Some of these impleaded parties simply alleged that as riparians they were entitled to the full flow of the stream; others set forth the quantity of water required for their needs; others alleged they were entitled to a reasonable quantity of water without specifying the quantity; while all of the claimants alleged that they will suffer damages in various amounts, if the defendant be permitted to pump 25,000-acre feet annually from the waters underlying the rancho. The defendant duly answered these various statements of rights, which answer alleged in substance that there was a surplus over the reasonable needs of these parties and available to appropriation. None of the impleaded parties offered any evidence at all. The trial court found that it is not true that any of plaintiff riparians, or impleaded parties has abandoned his riparian rights except the four above mentioned.

Although the court fully found the facts in reference to the bringing into the action of the impleaded parties, and although such parties are frequently referred to in the findings, apparently no specific findings determining their rights were made. In the conclusions of law, it is provided that "all proceedings in this action based upon or existing out of the reply to answer of the plaintiffs herein who are riparian owners, the statements of rights of all parties impleaded herein and the answers of defendant to such statement of rights, should be dismissed," and this provision is carried into the judgment. Of course, the court did find that, except for certain extraordinary flood waters, there was no surplus in the delta from which the defendant could take 25,000-acre feet annually, or any other fixed quantity.

Both appellant and respondents present lengthy arguments as to the constitutionality of section 534 of the Code of Civil Procedure, the respondents vigorously contending that the section is unconstitutional. We do not here find it necessary to pass upon the highly controversial and serious question as to the constitutionality of section 534, for several reasons. In the first place, so far as the impleaded riparians are concerned, they did not become parties to this controversy until after 1920. At that time a public use had long since attached in favor of appellant. In other words, so far as the riparians who first became parties to the action in and subsequent to 1920 are concerned, the property involved, as against them, had already been taken by appellant and was being devoted to a public use. Under such circumstances, the proceeding became in fact an inverse condemnation suit, governed by the principles reviewed by this court in *Collier v. Merced Irrigation District*, 213 Cal. 554, 2 P.(2d) 790. See, also, *Peabody v. City of Vallejo*, supra; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585; *Turner v. East Side Canal & Irr. Co.*, 169 Cal. 652, 147 P. 579; *Newport v. Temescal Water Co.*, 149 Cal. 531, 87 P. 372, 6 L. R. A. (N. S.) 1098. The appellant herein, therefore, had the right to have the damages, if any, of these impleaded riparians determined in this action. In fact, on the new trial, the appellant, if it be so advised, has the right to amend its answer so as to condemn the entire riparian right of these riparians, instead of just the excess over the needs of these parties, as the pleading now requests.

However, the above reasoning is not applicable to all the riparian respondents. The doctrine of inverse condemnation, as set forth in the *Collier Case*, supra, can be properly applied only where a public use has attached. As to the original riparian plaintiffs, whose rights have not been compromised, such public use did not attach to the quantity actually used by them for reasonable beneficial purposes prior to the filing of this action. However, as was held in the *Peabody Case*, and reaffirmed earlier in this opinion, the riparian as against an appropriator, has two major rights: (1) In the event a public use has not attached, and in the absence of a condemnation suit, he is entitled to an injunction to protect his prior right to the amount of water he presently needs for reasonable beneficial purposes; and (2) he is entitled to a judicial declaration of his prior right to whatever quantity he may in the future need for such uses. As to such prospective uses, however, it is obvious that when, as here, the appropriator takes the water and devotes the same to a public use, prior to the time such prospective needs arise, a public use has intervened as to the quantity required for such future uses. The appropriator may not desire to appropriate the water and to construct large and expensive works with the possibility constantly in the offing that the riparians, who have been protected by a declaration of their rights in the water for future purposes, will increase their reasonable and beneficial use of the water, so that ultimately, perhaps, none is left for appropriation. The appropriator may and probably would desire to condemn the riparians' right to use of the water in the stream for these prospective purposes. No good reason suggests itself why the appropriator should not be permitted to do this in the injunction suit by means of an inverse condemnation. The same compelling reasons that exist for permitting such a procedure when the entire riparian right is sought to be condemned likewise exists where the appropriator simply desires to condemn the right of the riparian to whatever additional water he may later need for prospective reasonable beneficial purposes. In both cases, the all important fact must exist that a public use has attached, but once that is present, this procedure seems to us sensible and well calculated to prevent multiplicity of suits and interminable

delays. The above principles make it unnecessary to pass upon the constitutionality of section 534 of the Code of Civil Procedure. That section attempts to provide a special type of condemnation procedure applicable only in water cases and, by its own provisions, is limited to cases where the defendant seeks to condemn the excess over the "actual and necessary beneficial uses" of the riparian. The section was undoubtedly intended to ameliorate the rule formerly prevailing that a riparian as against an appropriator was entitled to an injunction regardless of damage, but, under the new policy set forth in the 1928 constitutional amendment, the rule has been changed so that the necessity for the special procedure set forth in section 534 no longer exists. It is true that the appropriator may desire to condemn the right of the riparian to the excess over his present reasonable beneficial needs, but, as already pointed out, that result may be achieved, under well settled principles of equity, by an inverse condemnation suit, without resort to the special provisions of section 534.

[12,13] For the guidance of the trial court on the retrial of this case, and in future cases, the rule as to the burden of proof under the new policy should be stated. In the Peabody Case, *supra*, 40 P.(2d) 486, at page 498, it is stated:

"However, when one enters a field of water supply and seeks by appropriation to take water from such supply on the claim that there is more than sufficient for all reasonable beneficial uses by those who have the prior and preferential right, it would seem to comport with the principles of fairness and justice that the appropriator, in whatever way the issue may arise, should have the burden of proving that such excess exists." This rule, placing the burden on the appropriator who seeks to take water from a particular water field to show that there is a surplus, does not relieve the riparians and appropriators, who are already in the field, from the burden of proving the quantity of water that they have been using, and that such amount is necessary for their reasonable beneficial purposes. The rule throws on the new appropriator the burden of proving the existence of a surplus from which it can extract the quantity it desires from either the surface or subterranean flow without injury to the uses and requirements of those who have

prior rights. In the present case, while it is true the burden was on appellant to prove the existence of a surplus, that burden did not come into existence until after the respondent riparians first proved the amount required by them for reasonable beneficial purposes. This primary burden the riparians did not sustain. The evidence as to the existence of a purported surplus will be discussed more fully hereafter.

[14,15] Also, for the guidance of the trial court on the retrial, some mention should be made of appellant's contention that all the respondents, riparians and appropriators alike, are barred from securing an injunction in this case by reason of their alleged laches. This argument was not made in the trial court, but, in fact, was first made in appellant's reply brief. In the trial court and in its opening brief, appellant urged that the interveners and the impleaded parties were barred by reason of the intervention of a public use. The compromises above referred to have removed from the present case all such questions in reference to the interveners and, so far as the impleaded parties are concerned, that question has already been disposed of in this opinion. Appellant's present point is that, although admittedly the action involved herein was seasonably brought by respondents before a public use had attached, nevertheless, all respondents are barred from securing an injunction, for the reason that respondents failed, immediately after filing the complaint, *to apply for or to obtain a preliminary injunction* to prevent the public use from attaching. Apparently respondents did not apply for a *preliminary injunction* until some time in 1921. See *Tulare Irrigation District v. Superior Court of Tulare County*, 197 Cal. 649, 657, 242 P. 725. At that time, of course, the water was being, and for several years has been, devoted by appellant to a public use. Appellant now argues that failure to apply for such *preliminary injunction* prior to the time the public use attached, bars all the respondents from an injunction. To state the contention is to refute it.

Preliminarily, it should be stated that the evidence in this case shows that respondents notified appellant before it (appellant) sold its bonds or let any contract for the construction of its system that it should not proceed with the proposed work and warned it not to do so;

that the present action was commenced within 40 days of the giving of that notice and prior to the doing of any construction work; that the action was diligently prosecuted by respondents; that the trial was in progress during the time the construction work was performed; that the appellant constantly and publicly contended that its pumping operations, as proposed, would not affect in the slightest degree or to any extent the supply of water to which respondents were entitled; that for some time after the second season's pumping had been completed appellant contended in its answer that its pumping operations would not to any extent diminish the flow of any of the surface streams of the delta; and that after the first judge who tried this case was disqualified respondents continued diligently to prosecute the action and secured then a temporary injunction. In the face of these facts appellant now urges that because of the fact that respondents did not apply for and obtain a preliminary injunction restraining appellant from proceeding, respondents are now barred from securing an injunction. This startling conclusion is arrived at by certain inferences made by appellant from the decision in the case of Consolidated Peoples Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 P. 915. The real parties in interest in the above action were the appropriators in the present action and appellant. The conclusion is not justified by that or any other case relied on by appellant. It is arrived at only by a misapplication of the rule enunciated in the Foothill Ditch Co. Case. In that case the plaintiffs brought an action to enjoin the defendants from diverting water from the Kaweah river at a point above McKay Point. The Lindsay-Strathmore Irrigation District, the real defendant, sought to justify its proposed action by reason of its stock ownership in various ditch companies. After the action had been pending a few months, the plaintiffs therein applied for and the trial court granted a preliminary injunction to prevent the threatened diversion pending trial. The Lindsay-Strathmore Irrigation District appealed, and one of the technical grounds urged by it on that appeal was that no preliminary injunction should have been granted, for the reason that no water was flowing in the river when it was applied for and no restraint was necessary. In refuting this contention, this court,

among other things, pointed out the extensive preparations, then being made by the Lindsay-Strathmore Irrigation District to divert the water as soon as it should start flowing and then stated (205 Cal. 54, page 58, 269 P. 915, 918):

"In the presence of such preparations, the plaintiffs could not afford to remain passive until such time as the water rose in the river to a height which would render its actual diversion by these appellants possible, *without risk of the charge of laches in allowing the appellants' costly outlays, based upon a claim of right to proceed.*"

Based upon the italicized portion of the above quotation, appellant argues that this court must have held in that case that a preliminary injunction was proper "because, and only because, a failure to apply for such relief until the water had been actually diverted for public use would have subjected the plaintiffs in the action to the bar of laches so far as injunctive relief was concerned." Appellant's Reply Brief, p. 290.

Such conclusion is clearly a non sequitur. Obviously, all that this court meant by the above quotation was that an application for and the securing of a preliminary injunction before the diversion takes place is conclusive evidence that a public use has not attached and that plaintiffs have not been guilty of laches, but the absence of such a request merely subjects the plaintiff to the "risk of the charge of laches." Ordinarily, the filing of an action, with or without the request for a preliminary injunction, before work has commenced, will prevent a public use from attaching. *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 P. 906, 36 L. R. A. (N. S.) 185; *Miller & Lux v. Enterprise C. & L. Co.*, 169 Cal. 415, 147 P. 567; *Newport v. Temescal Water Co.*, 149 Cal. 531, 87 P. 372, 6 L. R. A. (N. S.) 1098; *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 266 P. 944, 58 A. L. R. 674; *Collier v. Merced Irrigation District*, supra; *Peabody v. City of Vallejo*, supra. A case might well be imagined, however, where the mere filing of an action, without diligent prosecution thereof, might be held to be laches and estop the plaintiffs. No such state of facts is here presented. Whatever the basis of the doctrine of the intervention of a public use may be, whether it be based on estoppel or public policy (see discussion in the *Peabody*

Case, *supra*, 40 P.(2d) 486, page 496), the facts in the present case are not sufficient to raise the doctrine as against the respondent riparians or appropriators, except as elsewhere in this opinion indicated.

We now pass to a discussion of the various points raised by appellant in reference to the judgment in favor of the plaintiff appropriators.

In reference to the appropriators, in addition to the findings above discussed, many of which are applicable both to riparians and appropriators and, therefore, need not be repeated, the trial court found that each of the corporate appropriators was entitled to a certain amount of water measured by rate of flow, that is, measured by cubic feet per second. In fixing the award to each respondent appropriator, the court, as already mentioned, divided the year into two 6 months' periods. Period No. 1 covered the period from February 1 to July 31, and period No. 2 from August 1 to January 31. In every case the amount of the award for period No. 2 was one-half the amount fixed for period No. 1. The following table shows the respective awards, the figures representing cubic feet per second:

Amounts Awarded Appropriators From the St. Johns River.

Name of Appropriator	Period No. 1	Period No. 2
Tulare Irrigation District	175	87.5
Tulare Irrigation Company	57	28.5
Lakeside Ditch Company	400	200
Jennings Ditch Water Company	20	10
Modoc Ditch Company	60	30*
Uphill Ditch Company	30	15
Packwood Canal Company	150	75
Mathews Ditch Company	20	10
Goshen Ditch Company	40	20

(*It is to be noted that there is apparently an error in the printed clerk's transcript in that the 30 cubic feet of water awarded the Modoc Ditch Company is entirely omitted from the findings, but it is quite clearly an error in transcription, inasmuch as that quantity is included in the aggregate award.)

Amounts Awarded Appropriators from the Lower Kaweah River.

Name of Appropriator	Period No. 1	Period No. 2
Consolidated Peoples Ditch Company	250	125
Fleming Ditch Company	12	6
Evans Ditch Company	47	23.5
Watson Ditch Company	38	19
Oakes Ditch Company	13	6.5
Persian Ditch Company	53	29
Farmers Ditch Company	150	75
Tulare Irrigation Company	40	20
Tulare Irrigation District	280	140
Elk Bayou Ditch Company	160	80

By the above awards the trial court awarded to all of the respondent appropriators, collectively, 2,000 cubic feet per second for period No. 1 and 1,000 cubic feet per second for period No. 2, the Lower Kaweah appropriators, as a group, receiving slightly more than the St. Johns appropriators. It is to be noted that the Tulare Irrigation District and the Tulare Irrigation Company appropriate from both rivers.

In fixing the aggregate award at the 2,000-1,000-cubic foot per second levels, the trial court apparently intended that the quantity awarded each appropriator was to be measured at the head of each appropriator's diversion ditch. For purposes of convenience, however, the trial court provided that before appellant could take any water *not less* than the total aggregate award for all appropriators must be in the stream immediately above McKay Point. Each individual award is to the effect that the named appropriator is entitled to a specified quantity out of the waters of the St. Johns or Lower Kaweah rivers, or Mill or Cross creeks, as the case may be, diverted through a designated ditch. The court then finds that "the aggregate amount of water which the said plaintiff appropriators as aforesaid have the right to take, divert and use, as hereinbefore found, is 2,000 cubic feet of water per second, *measured at the heads of their respective ditches*, or places of diversion, as aforesaid, at all times between the 1st day of February and the 31st day of July, both dates inclusive, of each and every year, and 1,000 cubic feet of water per second, *measured at the heads of their respective ditches*, at all times between August 1st of each year and January 31st, both dates inclusive, of the next succeeding year, and that it requires and said plaintiffs are entitled to have a flow of water in the Kaweah River *at and immediately above the cement weir at said McKay Point*, where said Kaweah River and St. Johns River divide, *of not less than 2,000 cubic feet of water per second*, at all times between February 1st and July 31st, both dates inclusive, of each year, *and not less than 1,000 cubic feet of water per second, measured at said McKay Point*, at all times between August 1st of each year and January 31st, both dates inclusive, of the next succeeding year, in order to supply and furnish to said plaintiffs, appropriators as aforesaid, *at the heads of their said re-*

spective ditches, the said respective amounts of water to which they are entitled."

The court also found "that by reason of the physical facts herein set forth, said McKay Point is a convenient and appropriate place at which to measure the flow of water in said Kaweah River at and immediately above the cement weir at McKay Point necessary to supply and furnish to said plaintiffs, appropriators as aforesaid, *at the heads of their said respective ditches*, the said respective amounts of water to which they are entitled as aforesaid."

Evidently, by these and other similar findings, the trial court desired to fix the quantity of water awarded to each appropriator at the head of its diversion ditch, but, for convenience, the total award for all appropriators was to be measured at McKay Point, many miles upstream from the diversion ditches of some of the appropriators. It is obvious that, in addition to the 2,000-1,000 cubic feet awarded to the appropriators as a group, there must be added an appreciable quantity to make up for seepage, evaporation, and other conveyance losses between McKay Point and the head of each diversion ditch. What this transmission loss would be for each appropriator is not found by the court. Hereafter, in this opinion when the 2,000-1,000 cubic feet limits or the specific awards to each appropriator are discussed, it must be remembered that such amounts must be increased by whatever this conveyance loss may ultimately be determined to be.

The trial court also found that the specific amount of water awarded each appropriator is the amount that is now and has been for more than ten years prior to the commencement of this action "appropriated, used, reasonably necessary and required at all times *when said quantity or more flowed therein, and all of the water flowing therein, when less than said amounts flowed therein*," and is the amount required "and reasonably necessary to such appropriators for irrigation, domestic and other useful and beneficial purposes, and for livestock to drink"; that the aggregate award of 2,000-1,000 cubic feet per second "*and including all lesser flows of water reaching the respective ditch heads or places of diversion of said plaintiffs is the quantity of water which has produced, and will*

produce, the respective amounts of water appropriated, beneficially used and reasonably needed and required by said respective plaintiffs for their respective beneficial uses and purposes"; that if any of the appropriators prior to the commencement of this action "failed to use the respective amounts of water which they respectively are herein found to possess the right to take, appropriate and divert, it was because said supply of said river was insufficient in consequence of the natural shortage of water and the fluctuations in the flow of said rivers"; that the appropriators have at times diverted in excess of their respective rights as found by the trial court; that at times the diversions of plaintiffs have been "diminished to amounts below said respective rights by the pumping of water on the Rancho de Kaweah by defendant."

The court also found several times, and expressed the finding in different ways, that there are certain extraordinary flood waters occasionally found in the two rivers here involved, to which the plaintiff appropriators have no right; that "such extraordinary storm waters and extraordinary flood waters as do occur in said Kaweah River, and its said branches and continuations, occur at such infrequent intervals and for such short periods of time, that the same do not constitute a dependable supply of water, or a supply that can be beneficially used for irrigation purposes, unless the same be impounded and accumulated over a term of years for a regulated use"; that the rate of flow and amount of water in the rivers varies greatly and fluctuates rapidly; that "the flow of the said rivers in the months from February to September, inclusive, is derived largely from the melting of the snows on the Sierra Nevada Mountains and the period of maximum supply and use is and has ordinarily been within the months of May and June; that in the months from October to January, inclusive, the flow is and has been derived largely from rains falling upon the watershed of said river; that the months of April, May, June and July provide a more dependable supply of water than the other months of the year and are months of greater use and requirement of water for irrigation of lands than are the other months of the year; that the flow of said rivers in said other months is less dependable and subject to fluctua-

tions and variations of more violence, and is frequently interspersed with high flows of varying height and short duration"; that the pumping by defendant on the rancho will diminish and has diminished the amount of the underground percolating waters in the basin; that such pumping has diminished and will diminish the surface flow of both rivers by induced seepage; that said pumping creates and has created a cone of depression in the underground water table that extends beyond the limits of the rancho, and which extends under the channel of the St. Johns river for a distance of approximately 5 miles, and under the channel of the Lower Kaweah river for a distance of approximately 4 miles; that said cone of depression also extends under and has affected some designated diversion ditches of some of the plaintiffs; that there is no surplus in the delta from which the defendant can take 25,000 acre feet annually, or any other fixed sum.

The above constitutes but a brief summary of the most important findings and is not intended as a complete summary, but simply to indicate the general trend of the lower court's decision. We pass now to a discussion of the specific points made by appellant.

[16-18] Appellant very strenuously urges that, by the above findings, the respondent appropriators as a group have been awarded a *continuous* flow of 2,000-1,000 cubic feet of water per second; that such a quantity of water, except in the year 1906, has never been produced in the Kaweah watershed; that if the 2,000-1,000 cubic feet of water award be translated into the number of acre feet that would be produced by such a rate of flow *flowing continuously* during the periods involved, the plaintiff appropriators have been awarded 1,081,080-acre feet per year; that the "average" yearly run-off of the Kaweah river is about 453,000 acre feet; that, so far as period No. 2 is concerned, in which respondent appropriators have been awarded a *continuous* flow of 1,000 second feet, never in the memory of man has there flowed that quantity of water in the stream for longer than 12 days in any 1 year, and, on the average, that quantity has been reached only for 3½ days each year during this 6-month period; that, as for period No. 1, never, in the memory of man, has the flow of the Kaweah river in any year exceeded or equaled 2,000 sec-

ond feet in more than 102 days out of the 181 days in this period; and that the average over the many years of record is but 16 days. Based upon the above premises, appellant argues that the evidence indisputably shows that none of the respondent appropriators has ever diverted the quantity of water awarded to it and that it can be demonstrated to a mathematical certainty that the awards are excessive. Appellant also urges that the trial court committed error in making its awards in second feet and contends that such awards should have been made in acre feet. We are of the opinion that appellant's arguments on these points are without merit. They are based entirely on the theory that the findings and judgment here involved award to each appropriator a quantity of water that could be provided by a *continuous flow* during each period of the number of second feet awarded. A reading of the specific findings in reference to the amount allotted to each appropriator, and the findings in reference to the appropriative right of the respondents, as a group, lends some color to this contention. Thus, in fixing the aggregate amount allotted to all of the appropriators, the court finds that they have the right to take 2,000 cubic feet of water per second "*at all times between the 1st day of February and the 31st day of July*" of each year, and the same language is used for period No. 2. In other findings similar language is employed. The judgment uses equally strong language. This language, when read literally and without reference to other portions of the findings and judgment, does apparently award a continuous rate of flow for the periods involved. It is our opinion, however, that when the findings are read as a whole and, particularly, when the findings are read in connection with the findings concerning the physical characteristics of the Kaweah river, they cannot be reasonably interpreted as awarding a quantity measured by a continuous rate of flow. We are of the opinion that the findings, properly interpreted, award a maximum rate of flow and that the court found that when the river flows at that rate, *including all lesser flows*, there will be produced the quantity that the court found respondents have heretofore appropriated and put to beneficial uses. The many findings heretofore quoted in this opinion, portions of which have been italicized, clearly indicate to us that this is the proper interpretation to be placed on the awards.

This is essentially respondents' position on this point. They concede that they, as a group, have never diverted a million acre feet annually, but contend that the trial court simply fixed a maximum rate of diversion for each appropriator, which rate, if taken when available and with all lesser rates, would produce the annual quantity heretofore diverted by these appropriators. It must be remembered that the trial court was here dealing with an extremely practical situation. It was faced with the necessity of in some way fixing the various appropriative rights of the respondents, many of which have been vested for over 50 years, and these rights had to be fixed in a stream the flow of which is extremely variable, varying, as has already been pointed out, not only from year to year, but from day to day, and even from hour to hour. In such a stream the respondents could not, and the evidence shows that they did not, appropriate a fixed quantity each year. The amount appropriated depended upon the quantity in the stream. In such a stream, where the appropriations of respondents have varied from year to year and season to season, the trial court could not fairly award a specific quantity, measured solely in acre feet, without treating unfairly these respondents whose rights long antedate those of appellant, or without fixing the award far in excess of the reasonable needs of respondents and so injuring appellant. If the flow of the Kaweah river were even and continuous at the 2,000-1,000 cubic feet per second levels, then it is true, that under the findings and judgment here involved, respondent appropriators, as a group, would receive over a million acre feet annually, a quantity of water far in excess of the reasonable needs of respondents, and a quantity of water far in excess of that ever produced by the Kaweah watershed, except in the year 1906. Such a quantity of water would make the delta virtually a swamp. If the flow of the Kaweah river were even and continuous, or even reasonably so, then perhaps the award should have been made of a specific quantity. *Eden Township Water Dist. v. City of Hayward*, 218 Cal. 634, 24 P.(2d) 492. But here each appropriator has had to take the water when, as and if it was in the stream. It was undoubtedly for this reason that the trial court made its award by fixing the maximum rate of diversion in terms of cubic feet per second as distinguished from acre feet, and then express-

ly found that this maximum rate of flow, including all lesser flows, is the rate of flow that will produce and has produced the respective amounts heretofore appropriated. It is true that this leaves the exact quantity awarded to each appropriator uncertain, and it is likewise true that whenever possible the courts require that the appropriative right be fixed with certainty (*Eden Township Water Dist. v. City of Hayward*, supra; *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 198 P. 784), but the uncertainty here involved is caused by the fact that respondent appropriators, because of the physical conditions already described, have been unable to appropriate a fixed quantity. The quantity appropriated each year, as already stated, depended upon the flow of the streams, and that was and is highly variable. For the foregoing reasons, we do not think that the awards involved herein can reasonably be interpreted to be continuous awards in the sense argued for by appellant, nor are we of the opinion that the trial court committed reversible error in fixing the awards in cubic feet per second instead of acre feet. However, inasmuch as we are of the opinion that the awards must be reversed for other reasons hereinafter appearing, and, in view of the retrial, the following suggestion is pertinent. It is our opinion that, in view of all the physical facts, it would be fairer to all concerned if the awards to the respondent appropriators on such retrial be made in cubic feet per second, together with an ultimate limitation in acre feet. Appellant, for reasons already stated, cannot legitimately complain of the rate of flow awards so long as the flow of the Kaweah river remains as it has been for the past 30 years. But if, from natural causes, the flow of that river should be increased, there can be no doubt that, under the rate of flow awards here made, the respondents as a group would be entitled to all that increase up to over a million acre feet annually. Admittedly that quantity has not and cannot be put to a beneficial use by respondents. Moreover, it is conceivable, that appellant may purchase the rights of some of the respondent appropriators, or purchase stock in some of the respondent companies, in which event it would have a very material interest in having the ultimate quantity to be received by those who have prior claims fixed with reasonable certainty. It is for these, and other reasons that we believe that the awards should be fixed in

cubic feet per second, with a maximum limitation in acre feet, measured, of course, by the maximum number of acre feet used by each appropriator in the past.

Before discussing the other attacks made by appellant on the awards, some mention should be made of the law applicable to the determination of an appropriator's rights.

[19-22] An appropriator, as against subsequent appropriators, is entitled to the continued flow to the head of his ditch of the amount of water that he, in the past, whenever that quantity was present, has diverted for beneficial purposes, plus a reasonable conveyance loss, subject to the limitation that the amount be not more than is reasonably necessary, under reasonable methods of diversion, to supply the area of land theretofore served by his ditch. The appropriator is limited to reasonable beneficial uses. A reading of the many cases on the law of appropriation indicates a gradual and consistent tightening of the rule measuring the rights of appropriators. The early cases measured the appropriator's right by the capacity of his ditch, but that rule has long since been repudiated in this state. *Smith v. Hawkins*, 120 Cal. 86, 52 P. 139. As the pressure of population has led to the attempt to bring under cultivation more and more lands, and as the demands for water to irrigate these lands have become more and more pressing, the decisions have become increasingly emphatic in limiting the appropriator to the quantity reasonably necessary for beneficial uses. *Senior v. Anderson*, 115 Cal. 496, 47 P. 454; *Id.*, 130 Cal. 290, 62 P. 563; *California P. & A. Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 138 P. 718; *Northern California Power Co. v. Flood*, 186 Cal. 301, 199 P. 315; *Oliver v. Robnett*, 190 Cal. 51, 210 P. 408; *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11; *Eden Township Water Dist. v. City of Hayward*, *supra*. If the appropriator uses more than the amount so required, he gains no right thereto. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. In so far as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017; *Big Rock Mutual Water Co. v. Valyermo*

Ranch Co., 78 Cal. App. 266, 248 P. 264. In determining what is a reasonable quantity for beneficial uses, it is the policy of the state to require within reasonable limits the highest and greatest duty from the waters of the state. *California P. & A. Co. v. Madera Canal & Irr. Co.*, *supra*. However, an appropriator cannot be compelled to divert according to the most scientific method known. He is entitled to make a reasonable use of the water according to the general custom of the locality, so long as the custom does not involve unnecessary waste. *Joerger v. Pacific Gas & Electric Co.*, *supra*.

[23-26] In a case, such as the present one, where prior appropriators are attempting to secure an injunction against a subsequent one, the action is in effect one to quiet the title of the prior appropriator. The burden of proof is on the prior appropriator, in such action, to show by a preponderance of the evidence, every element of the right claimed by him. Proof of long continued use of a definite quantity, however, under the proper circumstances, may raise a presumption the use was necessary, for it is not reasonable to suppose that one would destroy or impair the value of his land by the use of an excessive amount. *Joerger v. Pacific Gas & Electric Co.*, *supra*; *California P. & A. Co. v. Madera Canal & Irr. Co.*, *supra*; *Campbell v. Ingram*, 37 Cal. App. 728, 174 P. 366; *Stinson Canal & Irr. Co. v. Le-moore Canal & Irr. Co.*, 45 Cal. App. 241, 242, 188 P. 77. After the prior appropriator has satisfied this burden, subject to the above limitation, then the burden shifts to the new claimant to show by a preponderance of the evidence that, after providing for the rights of all prior claimants, there is a surplus in the water field from which it can take the amount claimed by it. It must constantly be kept in mind that in an action such as this, just as in any other quiet title suit, the plaintiffs must recover upon the strength of their own title and not upon the weakness of defendant's title.

It should be here pointed out that the respondent appropriators are not what has sometimes been called "periodic appropriators," that is, they are not intermittent appropriators. Respondent appropriators are all corporations whose main function is to distribute the water owned by them to their respective stockholders or consumers. To do this properly each corporation requires a continuous flow, when the water

is required at all. The individual consumer is a periodic appropriator, but the corporation of which he is a member, or from which he is entitled to water, is not. Appellant expressly concedes that respondent appropriators are not periodic appropriators, but does strenuously contend that such appropriators' rights and needs are seasonal.

[27] We pass now to a discussion of the main point urged by appellant that respondent appropriators have never diverted the quantity of water awarded to them. After reading all of the evidence set forth in the supplements filed herein, and after reading the major portion of the evidence contained in the transcript on this point and not contained in the supplements, we are convinced that the evidence produced by respondents overwhelmingly establishes that, except in years of extraordinary flow and except for certain exceptional spurts, the respondent appropriators herein, as a group, have used practically the entire flow of the Kaweah river during the height of the irrigation season for reasonable beneficial purposes. We are clearly of the opinion that during at least 4 of the months included within period No. 1 respondent appropriators have for many years used, as a group, the entire flow of the river up to 2,000 cubic feet per second, whenever it was available, and all lesser flows when that quantity was not available. As found by the trial court, the months of May and June are the months of greatest supply and use. The trial court also found that the months of April, May, June, and July provide a more dependable supply and are months of greater use and requirement than are the other months of the year. The evidence is overwhelming that during this 4-month period for many years prior to 1916 there has been a scarcity of water in the rivers and an insufficient amount to meet respondents' needs. It would serve no useful purpose to review the voluminous testimony on this point. It is during these months that appellant would like to pump water from the delta to the lands within its borders. The evidence and findings show appellant's great needs in this period. But appellant's needs cannot justify this court in depriving other property owners of their property rights long since vested. During this 4-month period the supply is not only greater than in other months, but it is a more dependable and continuous supply. It is the supply resulting from the

snow run off. The supply for the major portion of the balance of the year results largely from the rains falling on the delta and the foothills, and this supply is flashy and undependable.

However, as to period No. 2, and particularly for the months of October, November, December, and January thereof, we agree with appellant that the evidence does not support either the findings that respondent appropriators as a group diverted 1,000 second feet and all lesser flows when it was available, or that the amount that was actually diverted was all put to beneficial uses. We are also of the opinion that the evidence does not support the findings that each appropriator diverted for reasonable beneficial uses the specific number of cubic feet per second and all lesser flows when such were available, awarded to it. In discussing the question as to the extent, benefits and need of winter irrigation, it must be remembered that, although for convenience the trial court at times treated the respondent appropriators as a group, each respondent appropriator must recover, if at all, upon the strength of the evidence offered by it. Evidence as to use of water by one ditch company cannot prove how much another ditch company diverted. As an indispensable part of its case, each respondent appropriator was required to prove the amount that it had actually used in the past and, subject to the limitations already discussed, that the amount so diverted was devoted to and reasonably required for beneficial uses under reasonable methods of diversion. The necessity and benefits of winter irrigation might well be proved by general testimony not applicable directly to each ditch company, but no such general testimony can supply evidence as to the amount diverted by each respondent and what the amount diverted was used for. Such proof on behalf of each respondent appropriator was indispensable. Even at the risk of repetition, we repeat that each respondent must recover on the strength of its own title and not on the weakness of appellant's.

The inquiry as to the sufficiency of the evidence to sustain the findings in reference to the awards for period No. 2 naturally divides itself into three parts: (1) Whether the evidence supports the findings as to the amount awarded each appropriator; (2) whether the evidence supports the findings that all of the water used in this period was put to beneficial

uses; and (3) whether the amount used by respondents and their methods of diversion are, under all the circumstances, reasonable. These three problems will be discussed in order.

First, as to the sufficiency of the evidence to support the specific awards made to each respondent appropriator in period No. 2. In the following summary of the evidence, we refer only to the testimony of respondents' witnesses, and will try to summarize the strongest evidence to which we have been referred, or which our own investigation has discovered, in favor of each respondent.

On the Lower Kaweah river, the first diversion below McKay Point is that made through the canal known as the Consolidated People's ditch, supplying water for the Consolidated People's Ditch Company and the Elk Bayou Ditch Company. Because of its physical location, it secures the longest and most sustained diversion of any appropriator on the Lower Kaweah river. The parties hereto stipulated that the maximum area irrigated by the Consolidated People's Ditch Company in any 1 year with water from this ditch was 14,569 acres, of which 4,088 acres are devoted to alfalfa, 4,445 acres to orchards and vineyards, 4,265 acres to field crops, and 1,771 acres to wild pasture. Field crops include gardens, beets, beans, corn, grain, pumpkins, melons, and other miscellaneous crops of like nature. Many stockholders of this ditch company were called as witnesses. J. C. Sullivan testified that he irrigated his prunes once a year in March or April; his grain once or twice a year, usually in May or June; that he irrigated his alfalfa three or four or five times a year; that the last irrigation he gave his alfalfa was usually in July. Many others testified to the same general effect. W. A. Sims, Jr., testified that he irrigated his prunes in the fall and in February or March, when the ditch water came down; that most of his fall irrigation was not secured from the ditch but from pumps; that in ordinary years he sometimes got irrigation water in November and December and that such water was used for the purpose of irrigation; that sometimes "for several days at a stretch," he got ditch water in January and February, which was used to irrigate fruit trees and alfalfa. E. F. Hart, superintendent of this ditch and president of the company, testified that it was the custom to irrigate alfalfa whenever they could

get the water, even in December, January, and February; that alfalfa can be and is irrigated by the stockholders of this company "any month of the year"; that it is the custom to irrigate late peaches twice, in the spring and later in the summer, as late as August and September. Many witnesses testified that it was not usual to get any water from this ditch after July or the first part of August. During period No. 2, from August 1 to January 31, this appropriator has been awarded 125 cubic feet of water per second, and all lesser flows. We can find no evidence that that quantity of water ever flowed in this ditch in this period, nor can we find any evidence that this quantity and all lesser flows was ever diverted by this appropriator. Apparently none of the stockholders in this ditch testified as to the area irrigated in the winter months, nor as to the amount used in these months. It must be remembered that this appropriator, as well as the other respondent appropriators, with the exception of the Tulare Irrigation District, is a mutual water company and that it does not use, as a corporation, any of the water it diverts, but that it uses water only through its stockholders. The evidence above referred to establishes that when water occurs in the ditch in the winter months, some of the stockholders use it for irrigation, but that evidence does not establish the quantity diverted, or that 125 cubic feet of water per second ever flowed in this ditch in these months, or the area irrigated with what water was used. Even under a most liberal interpretation, such evidence is far too general, under the cases hereinafter referred to, to sustain the findings complained of. We realize that this evidence had to be directed to a period prior to 1916 and that appellant has been taking the water since 1918 and that the trial did not occur until 1922. Obviously, the evidence could not be as positive and certain as might be desired, but the above testimony is far too vague and indefinite to support a quiet title decree of a definite quantity of water in this period.

The Elk Bayou Ditch Company, as already stated, diverts through the Consolidated People's ditch. It was stipulated that the maximum area irrigated by this ditch company in any one year was 5,617 acres, of which 4,150 acres were devoted to alfalfa, 250 acres to orchards and vineyards, 776 acres to field crops, and 461 to wild pasture. In the briefs, we are not referred to any testimony by either of the

parties as to the specific practice as to winter irrigation by this company. H. C. Heitzeg, president of this company, testified that this appropriator got the major portion of its water through the People's ditch; that it received its water by virtue of stock ownership in the Consolidated People's Ditch Company; that they got some little water from Outside creek and occasionally a little from Lewis creek, but that he could remember only 1906 as a year when his company had received Lewis creek water; that it received its water from the People's ditch only after the prior claims of the Consolidated People's Ditch Company were satisfied; that he could remember in "three good years * * * probably 15 or 16 or 17 years" ago, when he had irrigated as late as the 4th of July, and even later, that he was the last one to irrigate on this ditch; that it was *not* the general custom of the stockholders of this ditch company *to irrigate as late as July*. Apparently the water ceases to be used by the stockholders of this company in normal years in June. For whatever irrigation is carried on after that, the water is procured, not from the ditch, but from pumping plants. This company has been awarded 80 cubic feet per second and all lesser flows in period No. 2. Such award, based, as it must be, on past use, finds absolutely no support in the record.

The Lakeside Ditch Company diverts from Cross creek, the continuation of the St. Johns river, and has been awarded 200 cubic feet of water per second, and all lesser flows in period No. 2. The maximum extent of the acreage under this ditch is in dispute, appellant conceding that 17,567½ acres are irrigated from this ditch, this respondent contending for a larger area. According to appellant's admission, 5,688 acres of the above total are devoted to alfalfa, 339½ acres to orchards and vineyards, 6,171 acres to field crops, and 5,369 acres to wild pasture. This respondent offered evidence that a larger maximum area was served by this ditch, but the above figures give an approximate idea of the nature of the crops grown and general division of the area among them. The superintendent of this ditch, J. B. Freeman, testified that it was the custom to irrigate grain once from April to about June 1; that some water usually comes into the ditch in February, "some little water, not a great bulk," and some in March; that sometimes they get some water as

early as December; that the winter water is the result of rains; that it comes in spurts; and that it is not dependable; that the snow run off constitutes the dependable supply and starts usually around April 1 and continues to about the middle of July; that the stockholders irrigate their alfalfa from the ditch about three or four times a year and irrigate their orchards twice a year; that the water seldom runs in the ditch after July; that he had been superintendent of the ditch for 4 years and had been engaged in farming and irrigating from the ditch for 11 years; that "we have never had any water since I have been in the Lakeside county, only in one instance, after July"; that "since I have been superintendent, the latest that we have had water in the ditch—I think last year [1921] was the latest, I think it went out on the 9th of July"; that prior to becoming superintendent he could remember one year—1915 or 1916—"when we had some water in August, but I couldn't say exactly how much at that particular time"; that he irrigated his alfalfa as soon as water was in the ditch any time after the first of the year; that occasionally they got a "little bit of water" in December.

E. W. Kerr testified that he had been familiar with the Lakeside ditch since 1875 and that he irrigated from it; that from 1877 to 1902, on various occasions, he had acted as ditch tender for this appropriator; that water usually comes into the ditch in February; that occasionally spurts occur in January, but that that is not the usual thing; that the irrigators from this ditch do not expect to get a run of irrigating water until the snow water comes from the mountains; that the snow run off usually comes in April and extends to about the 15th of July; that he had never noticed any irrigators irrigating grain in the fall of the year in the Lakeside territory for the reason that, "No, never had the water in the fall of the year."

E. H. Kimble, another irrigator from this ditch, testified that they sometimes got rain water in December and January, but when pressed as to quantity stated, "Well, sometimes we would get—there are periods for a few days when we have quite a run of water, but it don't last long, generally." Other stockholders testified in equally general language as to December and January irrigation water. The evidence as to the use of water from this ditch from September to December was very sketchy and even January was not very clear. The

evidence above quoted falls far short of sustaining a finding that all during period No. 2 this appropriator used the quantity awarded to it and all lesser flows. If the water was not there in any month or for any other appreciable period, it should not have been awarded.

The Watson Ditch Company diverts from the Lower Kaweah river and has been awarded 19 cubic feet per second and all lesser flows in period No. 2. The parties could not agree as to the maximum area irrigated by this ditch, the appellant conceding that 1,828½ acres were irrigated, this respondent claiming and proving a larger area. The crops grown here are similar to those grown on other parts of the delta, consisting of alfalfa, orchards, and vines, field crops and wild pasture. E. R. Pennebaker, an irrigator from this ditch, testified that he irrigated his orchards twice, in April or May, then in June or July; that alfalfa is irrigated four times; that he could not count on getting a fall irrigation for his fruit; that from his observation irrigations from this ditch started in April and ended in August or September; that in 1916 the water started to run in the ditch in November and ran all winter; that he did not remember the quantity but that it was a good run. He did not testify that he or any one else used this water. In reference to this testimony, respondents argue: "It must be obvious if there was a fairly good run of water in the Watson Ditch during all the winter, as Mr. Pennebaker testified, that the stockholders of that ditch must have used it even if Mr. Pennebaker personally did not use it. It certainly could not continue running down the ditch all winter without being used. None of respondents' ditches have wasteways." This negative inference is not sufficient to sustain a right to divert any fixed quantity of water during this period.

John N. Haggler testified that he used water "indifferently" from both the Watson and Persian ditches; that he usually would irrigate his alfalfa four or five times a year, starting in December or January, but that if he irrigated in December he would not do so in January. Other than this very general testimony as to use in December and January, there is no evidence that the irrigators under this ditch ever diverted any quantity in the winter period, or what area, if any, was irrigated in this period.

The Mathews Ditch Company diverts from the St. Johns river and has been awarded 10 cubic feet per second and all

lesser flows in period No. 2. The parties stipulated that the maximum area ever irrigated with water from this respondent was 928 acres, of which 692 were devoted to alfalfa, 14 to orchards and vineyards, 192 to field crops, and 30 acres to wild pasture. Morgan Rush testified that he had irrigated from this ditch for 18 years and owns over a quarter of the area irrigated from this ditch; that when he first knew the ditch "for a few years there it had water pretty late and some years pretty near all of the summer"; that in the early years it had water for nearly all the year, which water was used for irrigation; that the irrigators irrigate some in the fall months, when they had the water, and "some in the winter"; that he irrigates his pasture once or twice a year, but never later than June.

Fred Van Gordon, an irrigator from this ditch and superintendent of the same, testified that he had lived at his present home for 12 years; that for the first couple of years after moving to his present abode, the ditch "never did go dry"; that it had water in it the year round; that he did not know whether that water was used—"I know I used my part of it whenever I got it," for irrigation purposes; that at present he sometimes got water in December; that winter irrigation "did not seem to hurt his alfalfa any and killed the gophers out." Other irrigators testified that in their recollection the ditch on occasion had water in it all the year round, which water was used for irrigation, but none of them estimated the amount of water in the winter period nor the area irrigated. Other stockholders testified they never got water after September. Mrs. S. E. McCain testified that although she could remember a few years when the water ran the year round, she never used it the year round. Such evidence is insufficient to support the finding here under attack.

The Modoc Ditch Company diverts from the St. Johns river and has been awarded 30 cubic feet per second, and all lesser flows, in period No. 2. It was stipulated that the maximum area served by this ditch is 3,590 acres, of which 2,000 acres are devoted to alfalfa, 84 acres to orchards and vineyards, 850 to field crops, and 656 acres to wild pasture. John Riggins testified that he had been superintendent of this ditch since 1900; that he ordinarily commenced his duties in March or April and stopped when "the water stops," which is usually in August; that "once in a great while"

they got water in January or December; that the stockholders at the lower end of the ditch liked to get water for irrigation in the winter. Timothy Hayes testified that he sometimes got water in January, and that when it did come it was always used; that in "one or two years" he could remember getting water in December. John Perry testified that he used winter water when he could get it for irrigation and that it was good for his crops. John B. Rivers testified that he had irrigated his alfalfa in January and that such was the common practice. Other irrigators from this ditch testified that they never irrigated their alfalfa in December, January, or February, and still others that they did not practice winter irrigation. The evidence shows that the irrigators from this ditch have used some winter water, but what the amount used or the area irrigated therefrom may be is not disclosed.

The Uphill Ditch Company, the Jennings Ditch Water Company, and the Packwood Canal Company, all diverters from the St. Johns river, are treated as a group by respondents, and we will follow that course here. The Uphill Ditch Company has been awarded 15 cubic feet per second in period No. 2, the Jennings Ditch Water Company 10, and the Packwood Canal Company 75. The maximum area irrigated from the Uphill ditch was stipulated by the parties as being 1,873 acres, 1,148 being in alfalfa, 124 in orchards and vineyards, 107 in field crops, and 494 in wild pasture. The testimony as to actual practice as to winter irrigation under this ditch was very sketchy indeed. Monroe Rush, superintendent of this ditch, testified that he had been acquainted with the ditch for 30 years; that since he had been superintendent (from 1909 or 1910 to 1916) and again just prior to his testimony (which was in 1922) he closed the headgates of this ditch when the snow water ceases in August and kept them closed until about February of the next year.

According to appellant, the Jennings Ditch Water Company furnishes water to but 399 acres, this respondent claiming a larger area. The area is mainly devoted to the growing of alfalfa and field crops, with some acreage devoted to orchards and vineyards and a small area in wild pasture. George Bollinger, who had used water from this ditch for 15 years and who also received water from the Watson ditch, testified that he used water whenever it was present; that the *earliest* that he had ever

received water from the ditch under discussion was *February*; that he could not remember ever getting water from either of the ditches *after July*. Peter Fleutsch, superintendent of the ditch and also an irrigator therefrom, with 16 years' experience, testified that he could remember two years when he got water as late as August. Ernest Langdon testified that sometimes stockholders of this ditch do not require all the water in the ditch and permit some to flow down Mill creek; that he tried to irrigate his prunes in the fall; that he got water from the Wutchumna ditch as well as from the Jennings ditch.

The Packwood Canal Company, according to the stipulation of the parties, serves water to a maximum area of 3,000 acres, 1,460 acres of which are devoted to alfalfa, 536 to orchards and vineyards, 916 acres to field crops, and 79 acres to wild pasture. No satisfactory evidence of any kind was offered on the question of winter irrigation under this ditch. E. H. Kimble, an irrigator under this ditch, testified that he did not irrigate his orchards at all from the canal and that he irrigated his alfalfa from the canal but once or twice a year; that for the past 10 years [1912-1922] "we haven't had a great deal of water in Packwood * * * the Packwood is a short stream of water you know, we do only get high water, that is all we get"; that most irrigators in this section use pumping plants for irrigation. W. H. Wilbur, a farmer who had irrigated from this ditch since 1906, testified that before installing his pumping plant in 1914, he irrigated his alfalfa but once a year from the ditch—sometimes twice; that from 1917 to 1921 he had no water at all from Packwood; that he had a "good run" in 1916 and a short run in 1921, from which he irrigated 25 acres; that occasionally water for irrigation was in the canal as late as June or July; that a "good run" was had in 1922 in the summer; that he got probably half of his irrigation water prior to 1916 from the Tulare Irrigation District. J. F. Carroll, who had known the Packwood canal since 1887, testified that prior to 1916 "we would get as many as three runs"; that there were some years "we would not get any at all and some years we would get one run." Not one word of testimony was offered that this ditch, in the memory of any witness, ever had any water during period No. 2, and yet the trial court awarded this appropriator 75 cubic feet per second and all lesser flows for this period.

[28] Respondents concede that "as to the respondents Jennings Ditch Water Company, Uphill Ditch Company and Packwood Canal Company there seems to have been little testimony offered as to the actual practice of winter irrigation over these particular ditches." The respondents argue, however, that there were many witnesses from other portions of the delta who testified that fall and winter irrigation was a matter of common practice on the delta. They urge that the trial court was dealing with a large number of respondent appropriators who were grouped together in a common cause. Based on these premises, it is then urged that "testimony from witnesses in different parts of the delta that winter irrigation was a common practice and was beneficial * * * was sufficient to justify the trial court in awarding water to the Uphill Ditch Company for the same months that it awarded it to the other appropriators who made more specific proof. The same is true in reference to the Jennings Ditch Water Company and the Packwood Canal Company. There was such an abundance of evidence as to winter irrigation on the Kaweah Delta that it was not essential that every one of the appropriators present specific evidence on that question. If appellant, who admits the prior and superior right of all these appropriators to any right held or asserted by it, claimed that any of these appropriators had abandoned the water for the months of November, December and January, the burden was upon it to prove such abandonment, and no attempt was made by appellant in that direction." No cases are or can be cited to sustain such a conclusion. Such a conclusion is based on several misconceptions of the law applicable to the facts involved herein. As repeatedly stated in this opinion, each respondent appropriator was in effect attempting to quiet its title to a certain quantity of water as against appellant. Although each respondent appropriator had a common cause as against appellant, for purposes of ascertaining the quantity of water heretofore used by each appropriator, each appropriator had the burden of proof of showing by a preponderance of the evidence the amount it had diverted in the past. Evidence offered by one appropriator on this issue could not help any other appropriator. Evidence as to custom and usage on the delta generally could not tend to show that any one appropriator in the past had actually diverted any specific quantity. Moreover, it was not incumbent on the appellant, as stated in the

concluding portion of the above quotation, to prove a negative. The affirmative on this issue rested with respondents. We find no evidence at all that these three appropriators ever appropriated the quantities awarded them, together with all lesser flows, in period No. 2. The findings in this regard are totally unsupported.

The Evans Ditch Company diverts from the Lower Kaweah river and has been awarded 23.5 cubic feet per second in period No. 2. The parties could not agree as to the maximum area irrigated from this ditch, appellant conceding that at least 2,481 are so irrigated, respondent contending for a larger area. The crops grown are similar to those under the other ditches, with about 400 acres devoted to wild pasture. Charles H. J. Hausch, an irrigator under this ditch, testified that he needed the water as often as he could get it and oftener than he did get it; that he needed it throughout the year; that at least one year he got water throughout the year, which water was used for irrigation; that he tried, when water was available, to irrigate fox tails in winter for winter feed; that he irrigates alfalfa four times a year, grain and corn, once. G. L. Caldwell, superintendent of the ditch, testified that water came down the ditch in the fall and winter and that it was used to irrigate crops; that he apportioned the water among the stockholders whenever it was present in the ditch; that sometimes the water started to run in December and continued until August; that he closed the headgate of this ditch at the end of the irrigation season, apparently for the purpose of cleaning the ditch. Creed Archer testified that irrigators from this ditch used the water whenever it was present in the ditch and had used it for irrigation every month in the year. The evidence offered on behalf of this respondent did show that some water was present in this ditch in the winter period and that it was used for irrigation. No evidence, however, was offered as to the amount that was diverted during the winter period, or the area that was irrigated.

The Tulare Irrigation District diverts from both rivers. It has been awarded 87.5 cubic feet per second from the St. Johns river and 140 cubic feet per second from the Lower Kaweah river and all lesser flows in period No. 2. The maximum area ever irrigated in any one year by water diverted by this respondent was stipulated to be 12,199 acres, of which 7,905 are in

alfalfa, 602 in orchards or vineyards, 2,823 in field crops, and 869 in wild pasture. C. H. Slaughter, superintendent of the district, testified that as a general thing they could get only one irrigation a year from the canal of the district; that they supplemented the canal water with pumping plants; that they irrigate alfalfa and the orchards every month in the year (apparently from the pumping plants). J. B. Tingley, a former ditch tender for the district, testified that in 1915 the water started in the ditches of this respondent in April and ceased in July. C. H. Morris testified as to the benefits of winter irrigation and that he got water from the canal in February, 1922, from which he irrigated 12 acres. As to this appropriator, respondents concede "there is little testimony in the record specifically bearing upon the subject of winter irrigation from the canal system of Tulare Irrigation District, but there is testimony as to the benefits of winter irrigation." Obviously, an award of 227.5 cubic feet per second and all lesser flows cannot be upheld on such testimony.

The Tulare Irrigation Company likewise diverts from both streams. It has been awarded 28.5 cubic feet per second from the St. Johns river and 20 cubic feet per second from the Lower Kaweah river and all lesser flows in period No. 2. The maximum area irrigated with water furnished by this company has been stipulated to aggregate 5,284 acres, of which 1,588 are in alfalfa, 942 in orchards and vineyards, 2,279 in field crops, and 475 in pasture. H. A. Scott, superintendent of the ditch of this appropriator and an irrigator therefrom, testified that usually the water ceases to run in this company's ditch in June or July; that "one year we ran up into August, but generally, it quits in July"; that he never ran water in the ditch in September, October, or November; that he had irrigated from the ditch and knew others who had likewise done so in December, January, and February. R. E. Hess, an irrigator under this ditch, testified that, "I think the earliest run we ever got was in February from—up to about, some years, as late as the first of August, perhaps just a little before that"; that they had never got an "irrigating run" of water prior to February, but did occasionally get "spurts" before that. Walter N. Goins, another irrigator, testified that they could profitably use irrigation water any month in the year; that prior to 1916, when they had a "little extra water" they would ir-

rigate in the winter "but not very much"; that they always irrigated when they had the water; that he could not state the number of times he had irrigated in the winter prior to 1916; that he probably irrigated in the winter "a couple of times" between 1907–1917. Again, we find no evidence at all as to the amount diverted in the past or the area irrigated with what was diverted. Evidence that they could use water if they had it, of course, cannot sustain a finding awarding a specific rate of flow and all lesser flows which must be based on past use.

The Goshen Ditch Company diverts from the St. Johns river and has been awarded 20 cubic feet per second and all lesser flows during period No. 2. The maximum area irrigated by water furnished by this appropriator was stipulated to be 1,867 acres, of which 720 are devoted to alfalfa, 2 to orchards and vineyards, 545 to field crops, and 600 acres to wild pasture. E. Y. Logsdon, an irrigator under this ditch and one of the directors of this appropriator, testified that in 1912 no water at all ran in the ditches of this company; that in 1913 the water ran but 8 or 10 days; that in other years the ditch normally goes dry about the end of June; that the water came into the ditch in January, 1922; that in his 11 years' experience he had never known that to occur before; that if the water is available it is beneficial to irrigate in January and he has done so with water pumped from wells; that they irrigate alfalfa as late as November, apparently from wells. Such testimony is totally insufficient to show that any definite quantity was ever diverted for any purpose during the period here involved.

The Farmer's Ditch Company diverts from the Lower Kaweah river and has been awarded 75 cubic feet per second and all lesser flows for period No. 2. The parties agreed that the maximum area ever served by this appropriator was 7,365 acres, of which 2,850 are in alfalfa, 1,378 in orchards and vines, 2,840 in field crops, and 297 in wild pasture. Frank Rhoades testified that he had been familiar with this ditch since 1900; that in 1913 "there was maybe a week of water in January"; that then the water ceased flowing and did not commence again until March or April; that on a "general average" the water ceased flowing in this ditch between the 20th of June and the 10th of July; that in 1915 the water started in January and ran until July; that there was no winter run

in 1916 or 1918, a little in 1917. During the course of this witness' testimony, while he was discussing the *benefits* of winter irrigation, the trial court stated: "I do not want to arbitrarily limit the examination, but do you think yourselves that you have gone far enough *into the benefits* of winter irrigation on alfalfa? We have had it for two weeks." We can agree with the trial court, as already stated in this opinion, that the benefits of winter irrigation can be shown by general testimony, and that testimony that alfalfa was benefited by winter irrigation under one ditch would sustain a finding that it is beneficial under other ditches similarly situated, but we do not agree with respondents that evidence that winter irrigation was practiced under one ditch can justify or sustain a finding awarding a specific quantity to another ditch. There is no evidence at all to sustain the finding here under attack.

The Persian Ditch Company diverts from the Lower Kaweah river, and has been awarded 29 cubic feet per second, and all lesser flows, in period No. 2. Appellant concedes that this ditch serves at least 1931 acres, respondents contending for a larger area. Alfalfa and field crops are the principal crops grown, with an appreciable area devoted to orchards and vineyards and a relatively small area to wild pasture. T. A. Elliott, an irrigator from this ditch and formerly president of the board of directors of this appropriator, testified that he had been familiar with and had intimate knowledge of the Persian Ditch since 1898; that he irrigated alfalfa 3 to 6 times a year, corn twice, orchards in October or November and in the spring (February or March) and again in July; that they irrigate alfalfa whenever they can get the water, but winter irrigation of alfalfa is not practiced much because the water is not there to be used; that he does not irrigate alfalfa from pumps in the winter because it is not good practice "to irrigate alfalfa too much during the cold weather,—that is simply my opinion * * *"; that he had some recollection of getting a "flow of water" in some years in November and December, "but that is not what I term an irrigating season because the water with us in the ditches is not usually a continuous flow where it can be said to be run as an irrigating ditch; the first man who can grab the water probably gets it because there is no ditch tender on the ditch" in the winter months; that, although he knew of times when the water had come in December, January, and February, "very

infrequently if at all" was there enough to irrigate all the lands entitled to water from this ditch. J. F. Putnam, former superintendent of this ditch, testified that the length of time the water ran in this ditch varied from year to year; that "there was one year (between 1904 and 1908) that it run pretty near the whole season; of course, the latter part of it they did not irrigate much, but it run for stock water"; that he could not remember what year that was. Again we find a complete lack of evidence to establish this appropriator's claim that by past use it has established a right to divert in period No. 2, 29 cubic feet per second and all lesser flows. There is no evidence at all as to the amount or quantity or rate of flow diverted in the past, nor is there any evidence as to the area irrigated in the winter season.

The Oakes Ditch Company diverts from the Lower Kaweah river and irrigates a maximum of 1,022 acres, of which 216 are in alfalfa, 237 in orchards and vineyards, 287 in field crops, and 282 in wild pasture. Respondents refer us to no testimony supporting the finding awarding this appropriator 6.5 cubic feet per second and all lesser flows in period No. 2. The only testimony offered in reference to this ditch was apparently that of Byron W. Allen, who testified that he had known this ditch since it was built; that he irrigated alfalfa four times a year; that that number of irrigations was enough; that in June they generally got a sufficient head for irrigation purposes; that in July and August the supply of water is generally short. We have been referred to no testimony at all that there ever was diverted any quantity at all from this ditch for winter irrigation. The finding under attack is totally unsupported.

The Fleming Ditch Company also diverts from the Lower Kaweah river and, according to the stipulation of the parties, irrigates a maximum area of 1,014 acres, of which 372 are in alfalfa, 408 in orchards and vineyards, 84 in field crops, and 150 in wild pasture. Apparently but one witness was called to testify as to this ditch, U. D. Switzer, manager of the ditch since 1885 and acquainted with it since 1879. He testified that in a good year "I have seen the water run in the Fleming Ditch up to the 1st of October"; that then the water was turned out of the ditch to clean it and after cleaning it the water started to run again; that when it would start depended on the rain; that sometimes it started to run in November or December and some years not until February; that in many years, which he enumer-

ated, water ran in the ditch in November and December and ran continuously the rest of the season; that orchards were irrigated late in the fall or early winter; that alfalfa was irrigated whenever they could get the water; that he could not tell the amount of water in the ditch in these winter runs, "that varies." We find no evidence that this appropriator, during period No. 2, appropriated 6 cubic feet per second and all lesser flows.

We have referred to the evidence in reference to each corporate appropriator at some length. Every one of the witnesses referred to above was called as a witness for respondents, and we have tried to select the strongest testimony in favor of respondents. Such evidence falls far short of establishing the first element required to prove a right gained by appropriation, i. e., that the quantity awarded was actually, in the past, diverted and used by the one claiming the right. In not one case was there any evidence at all that any specific quantity had been diverted in period No. 2 by any one appropriator, nor was there any evidence as to the area actually irrigated in the winter period. The evidence does show in reference to some of the ditches that when water was present it was used, but not how much was used; that water was not often there, particularly in October, November, December, or January; that some ditches never did have any winter water; that some appropriators could use more water, if they had it. Such evidence is not sufficient under the authorities, to sustain a finding awarding a specific rate of flow and all lesser flows, for a definite period. In *Pabst v. Finmand*, 190 Cal. 124, page 133, 211 P. 11, 15, this elementary rule was restated as follows: "Claimants, to gain a right to the use of a definite amount of water, *must show that the quantity of water awarded them has been actually diverted*, that it was applied to a beneficial use, and that the amount claimed was reasonably necessary for such use." In discussing evidence somewhat similar to that produced here, and in holding such evidence insufficient, the court, in the *Pabst Case*, supra, 190 Cal. 124, at page 134, 211 P. 11, 15, pointed out that "although there is testimony that defendants used all they wanted, *there is no testimony to prove the use of any specific quantity of water for any particular time.*" In *Northern California Power Co. v. Flood*, 186 Cal. 301, 304, 199 P. 315, 317, it is stated, "In order to gain a right to the water the diverter must actually use it, and *the quantity used measures the extent*

of his right." See, also, *Turner v. East Side Canal & Irr. Co.*, 169 Cal. 652, 147 P. 579; *California, etc., Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 138 P. 718; *Haight v. Costanich*, 184 Cal. 426, 194 P. 26; *Cohen v. La Canada Land, etc., Co.*, 151 Cal. 680, 91 P. 584, 11 L. R. A. (N. S.) 752; *Smith v. Hawkins*, 120 Cal. 86, 52 P. 139; *Senior v. Anderson*, 130 Cal. 290, 62 P. 563.

[29] It must be remembered that appellant herein has an important legal interest in having the rights of respondents fixed, as a maximum, at the amount diverted by such respondents in the past. The appellant is the owner of about 1,100 acres of water bearing land in the delta, which land is so situated and its physical characteristics are such that it is and can be used as a natural underground reservoir. As the owner of such overlying land, the appellant has the legal right to extract water therefrom and to convey the same to distant lands for beneficial purposes, subject always to the condition that prior rights are not interfered with or injured thereby. *Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, 98 P. 260; *Newport v. Temescal Water Co.*, 149 Cal. 531, 87 P. 372, 6 L. R. A. (N. S.) 1098; *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. The appellant, therefore, has a vital interest in having the rights of each prior claimant fixed and determined at the amount that prior claimant has, in the past, actually diverted. It is no answer to say, as do respondents, that appellant did not prove that any quantity flowing in the two rivers was wasted. The burden was on respondents to show the amount they had diverted, not on appellant. Nor is it an answer to appellant's contentions on this point to say, as do respondents, that, as a group, they must have used all the water in the two rivers, because there are no wasteways on any of the ditches and, therefore, the water must have been used. Assuming the evidence would support such a finding, had it been made, such evidence would not justify a specific award in any quantity to any particular appropriator in this period. As already pointed out, appellant, as a matter of law, was entitled to have each respondent appropriator's right determined by the amount actually diverted by that appropriator in the past. The respondents cannot, on this point, be considered as a group—each one must be considered individually—and its title to the water can be quieted only upon the evidence offered by it. The

reasons for this have already been discussed at length.

[30] It should also be pointed out that the evidence shows that each appropriator closes its headgate for between two weeks to a month each year. No water should be awarded any appropriator during any period when it is not using it.

For the foregoing reasons, we are of the opinion that the awards cannot be sustained and that the judgment based thereon must be reversed.

We are also of the opinion that the evidence does not entirely support the findings that *all* the water that was used in the winter period (whatever the amount may have been) was put to beneficial uses. Preliminarily, it should be stated that, whatever quantity an appropriator has actually diverted in the past, he gains no right thereto unless such water is actually put to a reasonable beneficial use. 26 Cal. Jur. 93, § 286. What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

On the subject of the purposes to which the winter water was put, there was considerable evidence introduced by respondents, the trial court, in fact, at least once suggesting that it had heard enough on this point.

[31] Many of the witnesses produced by respondents were extremely vague as to the benefits of winter irrigation. One of them testified that winter irrigation "did not seem to hurt my alfalfa any and killed the gophers out; and I think where you irrigate early that way your alfalfa comes better." Another testified that from winter irrigation "the first benefit is you get rid of all your gophers, if you can irrigate in cold weather, or the spring—you get rid of your gophers and soak your land up thoroughly, and when the warm weather comes it starts the alfalfa to grow." Still another testified that he irrigated in December and January for the purpose of drowning out gophers and that such was the principal purpose of irrigating at that time, together with the purpose of starting the fox tail and wild feed. Another stated, "A man will always irrigate his alfalfa in the winter season if it is not raining, it helps to kill the gophers." Another,

"We surface irrigate to rid ourselves of the gophers * * * if you irrigate in the early spring you drown lots of them, freeze them to death." Another gave it as his reason for irrigating in winter that "every time we irrigate we kill gophers * * * the best season of the year to kill gophers is with cold water, irrigate in cold weather and kill them. The same thing with squirrels. You irrigate the squirrels in cold weather, in February, he gets wet and comes out and freezes to death." Many other quotations could be made to the same effect. A great many of respondents' witnesses seemed to be of the opinion that the only reason they irrigated during the winter season was to exterminate these pests. It seems quite clear to us that in such an area of need as the Kaweah delta the use of an appreciable quantity of water for such a purpose cannot be held to be a reasonable beneficial use. This seems to us so self-evident that no further discussion of the point is necessary. We, therefore, hold that whatever quantity of water was used by respondents solely for this purpose during the winter period was not devoted to a beneficial use and that, in so far as the finding of the trial court now under discussion is based on such use, it is unsupported by the evidence.

However, there was considerable other evidence introduced by respondents, clearly indicating that some of the water used by them in this period was used for reasonable beneficial purposes. Many practical irrigators, as well as experts, testified to this effect. Some testified that from their experience winter irrigation caused the plants to start active growth earlier in the spring, thus assuring a larger and better crop; others that it stores moisture in the soil so that, if there is a scarcity of water later in the year, the plants are sustained; others that it provides green feed for cattle in the winter months; others that by winter irrigation there is produced an extra cutting of alfalfa; others that it strengthens the first buds and sustains the trees. There is considerable evidence in the form of government reports, showing the benefits of winter irrigation in this and similar areas. All this evidence indicates that some of the water used in the winter months was put to beneficial uses.

[32] Appellant argues that the evidence shows that winter water is produced by rains falling in the foothills and on the delta at infrequent intervals and comes in spurts (which is the fact) and contends that since it cannot be predicted when such spurts will

occur, or how much water they will produce, they cannot be deemed to be a reliable source of supply and cannot be deemed to be put to beneficial purposes. We cannot follow the logic of this argument. Such argument, if sound, would necessarily result in the conclusion that one could never gain an appropriate right to the waters of a variable stream. If the respondents have used a definite quantity of water in the winter months for beneficial purposes, when such quantity was in the stream, they are clearly entitled to be protected, even though the amount cannot be predicted with certainty, or is of infrequent occurrence.

[33] This argument as to winter spurts is somewhat similar to another argument advanced by appellant, which is equally without merit. Appellant argues that in considering the beneficial use of water in any water area, the appropriators therein can acquire only an appropriate right to a quantity of water equal to some amount slightly over the mean low average produced in the watershed. Appellant contends that in any watershed where the lands are surface irrigated, only that area can be economically put under production that can be irrigated by the "average" yearly run off, less a large margin of safety. Any diversion in excess of the average yearly run off, less a margin of safety, cannot, according to appellant, ever be put to a beneficial use. In other words, appellant contends that it does not matter what quantity the appropriators as a group actually have diverted in the past, and put to what ordinarily would be beneficial uses, they cannot gain any right to an amount in excess of the average annual run off, less a margin of safety. Such a rule finds no support in the cases. It may be that, in a stream with a reasonably even and continuous yearly flow, an appropriator can gain no right to extraordinary additions to that stream. We do not decide that point. But in reference to a stream such as the Kaweah river, no such rule could possibly be applied. There is no such thing as an "average" run off of that stream. The United States Geological Survey from 1903 to 1921 made continuous flow measurements at Three Rivers, upstream a few miles from McKay Point. These records show that in 1912 the seasonal run off was 207,410-acre feet. In 1906, the run off was 1,088,440-acre feet. In 1916, the run off was 762,160-acre feet, while in 1917, it was 471,470-acre feet, and in 1919, 229,700-acre feet. In the last year preceding the trial (1921), the run off was 355,387-acre feet. The other years

showed great variations within the maximum of 1906 and the minimum of 1912. Such a stream has no "average" run off. Moreover, appellant's argument could be applied only where the prior appropriators use the water to irrigate permanent crops such as orchards and vineyards. Such crops, if they were solely dependent on surface irrigation derived from the Kaweah river, which they are not, necessarily would be economically limited to an area that could be irrigated by an amount of water reasonably to be expected each year. But such an argument can have no application to an area where about two-thirds of the total area is devoted to annual crops. As already noted, the most dependable supply from the Kaweah river is from the snow run off in the spring. Long prior to planting time, the farmers of the delta have accurate information as to the snow pack in the mountains and can reasonably estimate the amount and duration of the spring run off, and can and do plant their annual crops accordingly. The argument of appellant on this point is totally without merit and need not be considered on the retrial. The respondent appropriators are entitled to be protected in the amount they have heretofore diverted, when it was present, for reasonable beneficial uses under reasonable methods of use and diversion.

The third element necessary for the acquisition of a right by appropriation is that the water must be diverted under reasonable methods of use and reasonable methods of diversion. Appellant spends many pages of its briefs in an attempt to show that the quantity of water each appropriator has heretofore diverted throughout the year is greatly in excess of the quantity actually necessary to supply the beneficial purposes of the appropriator and contends that such excessive use of water has resulted in an injurious high water table with the creation of alkali and deterioration of the soil. Appellant further contends not only that there is an excessive use of water, but also that respondents' methods of diversion are wasteful. We are clearly of the opinion that both these points are without merit.

First, as to respondents' alleged excessive use of water. We do not find it necessary to review in detail the evidence on this point. Appellant concedes in its reply brief that "as might be expected, the evidence of the opposing parties as to the effect of the use of water upon the Kaweah Delta in the amounts heretofore diverted by the respondent appropriators, in so far as it created un-

toward conditions * * * is conflicting." Appellant spends many pages reviewing the testimony of its experts, tending to show that there was an excessive use of water on the delta. Stripped to its essentials, this argument is simply that testimony offered by it is more credible than that offered by respondents. Respondents offered evidence in abundance, both from practical irrigators and from experts, indicating that, under the system of irrigation there prevailing, the quantity used was reasonably necessary. Appellant's attack on this ground, cannot be sustained. Testimony as to damage to the soils of the delta, alleged to have been caused by the excessive use of water, with a resulting high water table, was highly conflicting. From reading the expert testimony presented by appellant, one would be led to believe that the Kaweah delta is rapidly becoming either a swamp or an alkali waste, while the experts for respondents would have us believe that the delta is a veritable Garden of Eden. In fact, the expert evidence was so conflicting that, even when these experts attempted to describe the physical conditions surrounding specific stations in the delta, it is only by a reference to the number of the station that it can be ascertained that the experts are talking about the same spot. The evidence amply supports respondents' contentions on this point. On this general subject of excessive use of water, we deem it pertinent to refer to what was said in *Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co.*, 45 Cal. App. 241, 252, 188 P. 77, 82: "There is this, also, to be said: That it is not at all probable that a number of farmers would use, for many years, for the purpose of irrigation, an amount of water that would destroy or impair the value of their land. Of course, they would not willingly do so; and it is hard to believe that, in these days of intelligent and scientifically directed agriculture, these men, who have located and built up a thriving community, would make such a grievous mistake as to cause deliberately their lands to become water-logged and depreciated for all the purposes of husbandry. The very fact that they used for so many years a certain quantity of water is, indeed, very persuasive evidence that such quantity was actually needed for such purposes. It is not conclusive evidence of that fact, but it is a circumstance of impressive significance."

[34, 35] Appellant also contends that, because of the alleged poor methods of diversion used by respondents, excessive quantities of water are used by them. There can

be no doubt that respondents as a group do not divert the water in the most scientific manner. There can be no doubt that in some cases, because of the paralleling of the ditches of some of the respondents, there is an uneconomic use of water. If all of the respondents constituted one appropriating unit, then perhaps there would be some merit in appellant's contention that respondents' methods are wasteful. But these various appropriators are not one unit—each one has its own appropriative right, gained by many years of use. The courts cannot and, even if they had the power, should not compel these appropriators, many of whom have been diverting water for over fifty years, at their expense, to build new systems of diversion.

It is true that most of the ditches of the respondents are earthen ditches and that, in the porous soils of the delta there is a resulting large conveyance loss caused by seepage. Respondents concede that under the system now prevailing on the delta there is a conveyance loss of between 40 to 45 per cent. Appellant contends that reasonably such conveyance loss should not exceed 30 per cent. For various reasons, appellant's contention cannot be sustained. In the first place, there were introduced into evidence various state bulletins dealing with the general question of conveyance losses on various irrigation projects. An examination of those bulletins indicates that many irrigation systems in the San Joaquin Valley have an average conveyance loss far in excess of 40 per cent. One very large system has had a conveyance loss of 55.2 per cent. over a period of five years, while another is estimated at 57.9 per cent. In the same bulletin is a table referring to four United States reclamation projects, built by government engineers, and on these four projects the lowest conveyance loss is 42 per cent. and the highest 51.4 per cent., the average being 46.8 per cent.

In the second place, respondents, as a matter of law, have the right to divert by means of earthen ditches. They cannot be compelled to construct impervious conduits in order that seepage water may be made available to appellant. An appropriator is not compelled either to irrigate in the most scientific manner known or to divert in the most scientific manner known. In *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 23, 276 P. 1017, 1024, the rule is stated as follows:

"While an appropriator can claim only the amount which is necessary to properly

supply his needs, and can permit no water to go to waste, he is not bound, as here claimed, to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality, and, as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system. *Farnham on Waters*, § 675; *Wiel on Water Rights* (3d Ed.) § 481; *Barrows v. Fox*, 98 Cal. 63, 32 P. 811."

[36-38] In view of the retrial, and in concluding this portion of this opinion, the following observations are pertinent. It must be remembered that respondents' appropriative rights long antedate any right of the appellant to any water at all for use on nonriparian lands. The prior rights of respondents, regardless of the great needs of appellant, must be protected. Respondents have developed a system of diversion and use on the Delta that has made that region one of the most prosperous and productive portions of California. We cannot hold, for reasons already stated, that respondents' methods of diversion and methods of use are wasteful. If appellant sincerely desires to save some of the conveyance loss, on the retrial, it can offer to defray the expenses of straightening some of the major ditches, or of building, in some cases, impervious ditches. Moreover, the trial court should not lose sight of the fact that this is an equity case. The equity courts possess broad powers and should exercise them so as to do substantial justice. Heretofore, the equity courts, in water cases, apparently have not seen fit to work out physical solutions of the problems presented, unless such solutions have been suggested by the parties. But it should be kept in mind that the equity court is not bound or limited by the suggestions or offers made by the parties to this, or any similar, action. For purposes of illustration, if the trial court, on the retrial, comes to the conclusion, based upon proper evidence, that a substantial saving can be effected at a reasonable cost, by repairing or changing some of the ditches, as above mentioned, it undoubtedly has the power regardless of whether the parties

have suggested the particular physical solution or not, to make its injunctive order subject to conditions which it may suggest and to apportion the cost thereof as justice may require, keeping in mind the fact that respondents have prior rights and cannot be required lawfully to incur any material expense in order to accommodate appellant. Other physical solutions, such as the possible impounding of some of the water during periods, if any, when it is not needed by respondents, whereby some water can be made available to appellant without injury to respondents may suggest themselves. Appellant has suggested one such plan, the construction of an impervious bypass to carry some of the waters of the Lower Kaweah river over the cone of depression created by the pumping of appellant. An examination of the specific plan suggested by appellant clearly shows that it is not adequate to protect respondents. Not only did it not cover the entire cone of depression clearly shown to exist by respondents' witnesses, particularly upstream from the rancho, but it failed to provide properly for injury necessarily resulting to certain of respondents' diversion ditches in the basin, and entirely disregarded the induced seepage to the St. Johns river. It may be, however, that the idea of a bypass has some merit. It may be that a proper plan can be worked out whereby a bypass can be constructed so that the respondents' rights will not be injured by appellant's pumping operations.

[39] In attempting to work out any physical solution that may suggest itself, or for any other purpose the trial court may deem sufficient, it seems well to refer to what was recently said by this court in the *Peabody Case*, *supra*, on this general subject (40 P.(2d) 486, page 494):

"If the attitude of the parties in a particular case be such as to embarrass the court in the proper determination of the case in view of a larger public interest involved and for the protection of all concerned, or for other sufficient reasons, the court might well invoke the aid of the division of water rights of the board of public works under section 24 of the Water Commission Act (St. 1913, p. 1027, as amended by St. 1931, p. 2421; *Deering's General Laws 1931*, vol. 3, Act 9091, p. 5017), in the determination of the rights to water and the use of water in accordance with the constitutional policy. See *Wood v. Pendola* [1 Cal.(2d) 435] 135

P.(2d) 526. The purpose of that state authority to safeguard rights in the use of water for domestic and agricultural purposes against a subsequent appropriator was evidenced in the case of *East Bay Municipal Utility District v. Department of Public Works* [1 Cal.(2d) 476] 35 P.(2d) 1027."

By section 24, above referred to, the trial court, in water cases, in its discretion, with or without a request from the parties, may order a reference to the state water commission, or it may refer the cause to the commission for investigation and report upon any one, or more, or all of the physical facts involved. The procedure outlined in the section seems well suited to cases as complicated as most water cases. The facilities of the commission can, in this manner, be made available to the trial court and that court can thus secure independent and impartial expert advice not colored by personal interest. Incidentally, the procedure outlined in this section will secure representation of the state in such actions, thus insuring the protection of the rights of the public.

[40] Also, in view of the retrial, some mention should be made of the priorities between the various respondent appropriators. The trial court stated in its findings that it made no findings as to the priorities or rights existing between the respective plaintiffs and interveners, as against each other, and that the findings were not intended to affect the rights of the plaintiffs and interveners, as against each other. A similar provision was incorporated in the judgment. As an abstract proposition, such findings embody a sound principle of law. Of course, ordinarily, a verdict fixing the rights of several plaintiffs, as against a defendant, would not be res adjudicata in a subsequent action between those plaintiffs. That is apparently what the trial court had in mind. But in the present case, there is also another principle involved. As an integral part of their case, each of the respondents herein had the burden of proving when the amount diverted by it was actually diverted. The appropriator is limited not only by the amounts diverted in the past, but also to the times it diverted the water in the past. If, in fact, as appellant claims, there existed a fixed schedule of priorities among the various respondent appropriators and, if such schedule was actually observed among such parties and if, as ap-

pellant claims, under this schedule of priorities, the diversions of some of the appropriators were so limited and postponed that they could not and did not take the water except during a limited period, obviously, such appropriator, with such a limited right, could not establish a right to take the water for the entire year. Stated another way, if any appropriator's right in the past has been so limited by reason of prior appropriations by others that it actually did not get and use water in certain periods of the year, obviously it could acquire no right as against appellant to a continuous flow for the entire year. During the course of this trial, it developed that there were two river associations, one for the St. Johns and one for the Lower Kaweah. Each of the associations consisted of the appropriators on that river and acted in the interests of all its members. During the course of the trial, there was introduced into evidence by respondents themselves a so-called schedule of priorities supposedly existing among the members of each association. If this schedule of priorities shows the actual practice on each river, then, according to appellant, it is mathematically demonstrable that some of respondents' ditches did not and could not receive any water during certain portions of the year. On the retrial, it would seem to be an indispensable part of respondents' proof to show how and when the water was actually diverted by them in the past and thus incidentally to show the priorities actually existing between the parties.

For the guidance of the trial court, some mention also should be made of several other points. The trial court found that there was no surplus of water in the Delta from which the appellant could take 25,000-acre feet annually, or any other fixed quantity, without injury to respondents. That finding, however, is necessarily based on the findings which fixed the amounts awarded to each appropriator. These awards, as we have already held, are unsupported, and so the finding that there is no surplus falls with them. That will be one of the main issues to be determined on the retrial.

The last main point necessary to be discussed is whether or not the evidence shows that appellant's pumping has caused or will cause seepage losses from the St. Johns river at all, or has caused, or will cause, seepage losses from the Lower

Kaweah river in excess of 10 second feet. First as to the seepage losses from the St. Johns river. The trial court found that the pumping operations of defendant have created a cone of depression extending beyond the limits of the Rancho de Kaweah; that the cone of depression is approximately $2\frac{1}{4}$ miles in width from northwest to southeast and 4 miles in extent from northeast to southwest; that the cone of depression extends under the St. Johns river for a distance of approximately five miles; that the well of defendant in closest proximity to the St. Johns river is situated about one-half mile south therefrom. The court also found that the pumping operations of defendant and the cone of depression created thereby, extended under certain designated diversion ditches or canals of respondents located in the basin. Several of the wells are located within two to three hundred feet of these ditches. The appellant makes a determined assault on these findings. It reviews at length the theories of *its* experts, all of whom testified that appellant's pumping did not affect the surface flow of the St. Johns. After an analysis of the evidence produced by respondents on this point, we are of the opinion that the expert and lay testimony produced by respondents overwhelmingly supports the above findings. Respondents not only proved these points by opinion evidence, but also by factual evidence, which proves the correctness of the trial court's findings to a mathematical certainty. The peculiar geological formation of the basin, with its two outlets through the Venice Hills, one for each river, and with the impervious red lands to the north, makes the basin a large underground reservoir. The Venice Hills present an effectual barrier to the underground waters of the basin percolating away therefrom in appreciable quantities. Pumping operations of the appellant materially decreasing the underground supply caused induced seepage from the St. Johns river and the above-mentioned diversion ditches. Appellant's contention that the bed of the St. Johns river is composed almost entirely of impervious materials through which the waters in the stream cannot percolate and, hence, that there can be no induced seepage is not borne out by the evidence. The evidence produced by respondents proved quite conclusively that while there are some small and isolated areas of impervious material, the larger portion of the bed of this river north of

the rancho is composed of sands and alluvium, through which water will percolate rapidly. The evidence clearly shows that there is a direct contact between the waters in the stream and the underground waters, and that the removal of the latter by the pumping operations of appellant results in the removal of water from the stream.

As to the Lower Kaweah river, the appellant admits that its pumping operations directly diminish the flow of this river, but contends that they do not do so to the extent fixed by the trial court. The trial court found that the cone of depression extends under the bed of the Lower Kaweah river for about four miles; that the pumping operations of appellant have diminished and in the future "will diminish the late surface flow of the Lower Kaweah River in amounts at all times in excess of ten cubic feet of water per second, and that the amount of said diminution has varied during said pumping operations, from day to day and season to season, and that said operations of defendant on various occasions and for many a day have diminished the late surface flow of the Lower Kaweah River to an extent in excess of forty (40) cubic feet of water per second. * * *" This finding is amply supported by the evidence. The plan offered by appellant to prevent this loss, that is, the construction of an impervious bypass over this area, to carry some of the water, for reasons already discussed, was not adequate. On the new trial, perhaps a physical solution better fitted to the needs of the situation will be suggested.

No useful purpose would be served by retrying the issues presented by the question as to whether the pumping operations of the appellant have in the past caused and, if continued, will cause seepage losses from the two rivers and the designated diversion ditches, as found by the trial court. The portions of the judgment dealing with this question should, therefore, be affirmed.

The retrial of this action need not be a protracted one. The trial court, upon proper application, can and undoubtedly will grant a preliminary injunction that will protect all parties pending and during the new trial. Large portions of the evidence can and probably will be stipulated to, and many other portions of the evidence introduced on this trial will not be necessary. As to the appropriators, the

issues on the retrial will be greatly simplified. The respondents must prove the quantities of water diverted by them in the past and that such waters were devoted to beneficial uses. Respondents' methods of use and methods of diversion have, in this opinion, been held to be reasonable. If appellant can show, after respondents' prior rights are filled, that there is a surplus, it will be entitled to that surplus. If the appellant or the trial court can discover a reasonable physical solution so as to save any portions of the waters without injury to respondents, such physical solution undoubtedly will be enforced by the trial court.

For the foregoing reasons, the judgment appealed from is reversed, affirmed, and modified, and, as modified, affirmed, as follows:

1. By reason of the stipulation of the parties hereinafter named, the court below is directed to modify the judgment appealed from as between respondents and interveners H. E. Wright, S. E. Railsback, Gilbert H. Russell, Gordon Hall, James K. Moffitt, Joseph G. Hooper, Willys Hall, George A. Smith, Nellie M. Smith, and Alice C. Hall and appellant in the following particulars:

(a) By adding to paragraph X of said judgment, at the end thereof, the following: "Except that said Defendant Lindsay-Strathmore Irrigation District is entitled and has the right, as against said Interveners and each of them, their successors and assigns, to pump, take, divert and carry away from the said Kaweah River or any of its branches or extensions, or from the St. Johns River or any of its branches or extensions, or from the Rancho de Kaweah, or from the underground water underlying the said Rancho de Kaweah or what is known as the Kaweah Delta, without any objection or interference on the part of said Interveners, their successors or assigns, or any of them, in each and every calendar year, at such time or times, and at such rate or rates, as said defendant may desire, such amount of water as shall, in any year, equal but not exceed the amount of water which would be produced or discharged by an average continuous flow, during such year, of 35 cubic feet of water per second; and to transport said quantity of water so pumped, taken, diverted or carried away by said Defendant to and upon the lands within the boundaries of said Lindsay-Strathmore Ir-

rigation District, as they are now defined, for use upon said lands for irrigation and domestic uses and other beneficial purposes."

(b) By adding to paragraph XIV of said judgment, at the end thereof, the following: "Except that as against said Interveners, H. E. Wright, S. E. Railsback, Gilbert H. Russell, Gordon Hall, James K. Moffitt, Joseph G. Hooper, Willys Hall, George A. Smith, Nellie M. Smith, Alice C. Hall and each of them, their successors and assigns, said Defendant may, notwithstanding anything in this paragraph or in this judgment to the contrary contained, pump, take, divert and carry away from the said Kaweah River or any of its branches or extensions, or from the St. Johns River or any of its branches or extensions, or from the Rancho de Kaweah, or from the underground water underlying the said Rancho de Kaweah, or said Kaweah Delta, in each and every calendar year, at such time or times, and at such rate or rates, as said defendant may desire, such amount of water as shall, in any year, equal but not exceed the amount of water which would be produced or discharged by an average continuous flow, during such year, of 35 cubic feet of water per second, and to transport such amount of water to and upon the land within the boundaries of said Lindsay-Strathmore Irrigation District as they are now defined, for irrigation and domestic uses and other beneficial purposes."

(c) By eliminating from said judgment paragraph XX thereof.

The judgment, when modified in the several particulars above mentioned, stands affirmed, as between these parties.

2. In accordance with the stipulation and agreement of the parties hereinafter named, the motion of appellant to reverse the judgment in favor of the Mineral King Fruit Company is hereby granted and the cause remanded to the court below with instructions to dismiss the action of the plaintiff, Mineral King Fruit Company, with prejudice.

3. By reason of the stipulation of the parties hereinafter named, the court below is hereby directed to modify the judgment appealed from as between respondent and intervener Marietta R. Gray and appellant in the following particulars:

(a) By adding to paragraph XI of said judgment, at the end thereof, the following: "Except that the said defendant Lind-

say-Strathmore Irrigation District is entitled to and has the right as against said Intervener Marietta R. Gray, her successors and assigns, to pump, take, divert and carry away from the underground water underlying the said Rancho de Kaweah, without any objection or interference on the part of said Intervener, her successors or assigns, or any of them, irrespective of whether such pumping, diversion, taking or carrying away of said water shall diminish, lessen, or interfere with the flow of water in said Kaweah River, or any of its branches or extensions, or any natural water course, ditch or canal, or any underground waters in each and every calendar year at such time or times, and at such rate or rates as said defendant may desire, such amount of water as shall in any year equal but not exceed the amount of water which would be produced or discharged by an average continuous flow during such year of 35 cubic feet per second, and to transport said quantity of water so pumped, taken, diverted or carried away by said defendant to and upon the lands within the boundaries of said Lindsay-Strathmore Irrigation District as they are now defined, for use upon said lands for irrigation and domestic uses and other beneficial purposes."

(b) By adding to paragraph XIV of said judgment, at the end thereof, the following: "Except that as against said Intervener, Marietta R. Gray, her successors and assigns, said Defendant may, notwithstanding anything in this paragraph or in this judgment to the contrary contained, pump, take, divert and carry away from the underground water underlying said Rancho de Kaweah in each and every calendar year, at such time or times, and at such rate or rates, as said defendant may desire, such amount of water as shall, in any year, equal but not exceed the amount of water which would be produced or discharged by an average continuous flow, during each year, of 35 cubic feet of water per second, and to transport such amount of water to and upon the land within the boundaries of said Lindsay-Strathmore Irrigation District as they are now defined, for irrigation and domestic uses and other beneficial purposes."

(c) By eliminating from said judgment paragraph XXI thereof.

The judgment, when modified in the several particulars above mentioned, stands affirmed as between these parties.

4. As to the various riparian respondents, including the respondents impleaded, whose rights have not been settled by compromise or stipulation, those portions of the judgment fixing the riparian nature of their respective parcels of land are affirmed.

5. As to the riparian and overlying respondents, including the impleaded parties, whose rights have not been settled by compromise or stipulation, the judgment appealed from is reversed, except as limited by paragraphs 4 and 6 hereof, with directions to the trial court to proceed with the retrial as to these parties, in accordance with the views expressed in the body of this opinion.

6. As to all the parties, those portions of the judgment declaring that defendant's pumping has diminished and will, if continued, diminish the surface flow of both rivers and some of the diversion ditches, and fixing the extent of the cone of depression created by such pumping, are affirmed.

7. As to the appropriators, except as limited by other portions of this order, and particularly by paragraph 6 hereof, the judgment appealed from is reversed, with directions to the trial court to proceed with the retrial as to these parties, in accordance with the views expressed in the body of this opinion.

8. All parties to bear their own cost on this appeal.

We concur: SHENK, J.; CURTIS, J.; NOURSE, Justice pro tem; SEAWELL, J.; PRESTON, J.

On Petition for Rehearing.

PER CURIAM.

[41] Respondents' petition for a rehearing is denied. Appellant's petition for correction and modification of the opinion is likewise denied. While it is true, as urged by appellant, that there is no specific paragraph of the judgment of the trial court directly referring to the matters affirmed by paragraph 6 of the order of this court, it is also true that many portions of the judgment are necessarily based thereon. Several paragraphs of the judgment of the trial court provide that the rights of the respondents must be satisfied before the appellant is entitled to pump any water for nonriparian uses from the waters underlying the Rancho de Kaweah. Those portions of the judgment can only be un-

derstood by reference to the findings wherein the physical characteristics of the basin; the effect of appellant's pumping on the surface flow of the two rivers, and the extent of the cone of depression are set forth in detail. As set forth in the opinion heretofore filed in this case, the evidence produced by respondents overwhelmingly supports the findings as to the effect of any pumping on the Rancho de Kaweah, on the surface flow of the two rivers, and on the designated diversion ditches, upon which the portions of the judgment above referred to are based. Under the circumstances it would be an unjustified burden to require respondents, on the new trial, to re-establish the matters referred to. Appellant concedes that an appellate court may, in ordering a new trial, limit such new trial to particular issues, letting certain findings stand upon such new trial. For all practical purposes, that is precisely the legal effect of paragraph 6 of the order of this court. It was intended by that paragraph to exclude from consideration on the new trial all issues mentioned in paragraph 6, and to let the findings in reference thereto, and the portions of the judgment supported thereby, stand on such retrial.

The other matters raised by appellant do not require discussion.



TEXAS CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. (OL-CESE et al., Interveners). *
Civ. 9261.

District Court of Appeal, First District,
Division 1, California.
May 23, 1935.

Hearing Granted by Supreme Court
July 22, 1935.

1. Executors and administrators ⇨150

If lease executed by special administrator was void, lessee was entitled to return of consideration paid for lease.

2. Courts ⇨198

Probate proceedings being purely statutory and therefore special in their nature, the superior court, although court of general jurisdiction, is circumscribed in such class of

proceedings by provisions of statute conferring such jurisdiction and may not proceed in manner essentially different from that provided.

3. Executors and administrators ⇨10

Residence and death of intestate within county gave superior court of that county, by virtue of petition for letters of administration, jurisdiction of subject-matter of intestate's estate.

4. Executors and administrators ⇨9

Although jurisdiction over subject-matter of estate authorized appointment by superior court of an administrator, where statutory provisions provided exclusive method for exercise of such authority, an appointment contrary to applicable statute would be in excess of court's "jurisdiction."

"Jurisdiction" sometimes means authority over the subject-matter, but it also frequently means authority to do particular thing done.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

5. Executors and administrators ⇨150

Presentation of petition for an order to lease realty of decedent's estate by an authorized person is jurisdictional fact and if court erroneously grants petition of unauthorized person, its order is void and cannot support lease (Code Civ. Proc. § 1579, subd. 1).

6. Executors and administrators ⇨20(10)

In seeking and obtaining permission of superior court to lease property of estate, bank was not acting under its appointment as general administrator, since prosecution of appeal from order of appointment, pending which appeal the proceedings were had for leasing the property, suspended authority of bank as general administrator (Code Civ. Proc. § 1579).

7. Executors and administrators ⇨22(2)

Proceedings in certiorari resulting in annulment of order appointing bank special administrator was a direct attack on order.

8. Executors and administrators ⇨29(2)

Action to recover consideration paid for lease executed by bank as special administrator on ground that lease was void because of void appointment of bank as special administrator constituted a collateral attack on order of appointment (Code Civ. Proc. § 1579).

9. Judgment ⇨475

Same presumption as to jurisdiction attaches to decrees in probate proceedings on collateral attack as to other judgments of su-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 127.

perior court as a court of general jurisdiction.

10. Judgment ⚡485

To be attackable collaterally for lack of jurisdiction, order in probate proceedings must be void on its face, in which case it can be attacked at any time, but it is not void on its face unless record affirmatively shows that court was without jurisdiction to make order.

11. Executors and administrators ⚡29(3)

Where notice of application for appointment of special administrator was necessary to give court jurisdiction but order of appointment recited that notice was not necessary and was dispensed with, order was void on its face and could be attacked any time, directly or collaterally, either by parties or strangers (Code Civ. Proc. § 1412).

12. Executors and administrators ⚡150

Where order appointing bank special administrator was void, lease of estate lands executed by such special administrator was likewise void (Code Civ. Proc. §§ 1412, 1579).

13. Statutes ⚡268

Curative statutes generally cure merely those defects which do not concern jurisdictional steps.

14. Executors and administrators ⚡22(3)

In view of large powers of special administrator, some reasonable notice to persons interested in estate prior to his appointment should be required (Code Civ. Proc. § 1412).

15. Executors and administrators ⚡22(1)

Total lack of jurisdiction to appoint special administrator due to absence of notice sufficient to constitute due process of law could not be cured by curative statute (Code Civ. Proc. § 1412; St. 1931, p. 1409).

16. Executors and administrators ⚡150

Doctrine of caveat emptor was inapplicable to defeat lessee's recovery of consideration paid special administrator for lease which was void because of invalidity of appointment of special administrator, although doctrine was applicable in so far as estate's title to demised property was concerned (Code Civ. Proc. §§ 1412, 1579).

17. Executors and administrators ⚡377

Void probate sales may be ratified either directly or by course of conduct which estops the party from denying their validity.

18. Executors and administrators ⚡150

Where lease executed by special administrator was void because of invalidity of such administrator's appointment, agreement, to which lessee was not a party, executed by

special administrator and heirs ratifying acts of administrator was insufficient to validate lease and to prevent lessee's recovery of consideration paid, in view of statutory provision that no unauthorized act can be made valid retroactively to prejudice of third persons without their consent (Code Civ. Proc. §§ 1412, 1579; Civ. Code, § 2313).

19. Executors and administrators ⚡150

Lessee of estate property under lease which was void because of invalidity of special administrator's appointment, never having exercised any rights under lease and having, on learning that appointment was invalid, made repeated demands, first, for valid lease and then for its money, and having warned administrator that it would be held responsible for the money held not estopped from asserting invalidity of lease and demanding repayment of consideration given (Code Civ. Proc. §§ 1412, 1579).

20. Executors and administrators ⚡150

Lessee of estate property under lease which was void because of invalidity of appointment of special administrator was not concluded, by order settling and approving administrator's account, from demanding of special administrator repayment of consideration since lessee, not being person interested in estate, and not being able to contest account, was not bound by order of settlement (Code Civ. Proc. §§ 1412, 1579; Probate Code, §§ 927, 931).

21. Executors and administrators ⚡504(6)

Probate court in settlement of an administrator's account has no jurisdiction to determine rights of those claiming adversely to estate nor to confirm a previous sale made by administrator (Probate Code, §§ 927, 931).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the Texas Company against the Bank of America National Trust & Savings Association, Victor Olcese, and others, as administrators of the estate of L. V. Olcese, also known as Louis Virgin Olcese, deceased, in which Emelia G. Olcese and others intervened. From a judgment for plaintiff, the first named defendant appeals.

Affirmed.

Borton & Petrini, of Bakersfield, for appellant.

Charles C. Stanley and J. A. Tucker, both of Los Angeles, for respondent.

PER CURIAM.

[1] After a trial upon stipulated facts, judgment was rendered that respondent recover from appellant money paid as consideration for the execution by the latter, as special administrator of the estate of L. V. Olcese, of an oil lease demising land of the estate to the former. The regularity of the proceedings for authority, taken under section 1579 of the Code of Civil Procedure, is not challenged. This appeal raises the following questions: (1) Was the lease void, because of a void appointment of appellant, as special administrator? and (2) Was the lease, if void, validated by curative statutes or subsequent conduct of the parties? If the lease was void, respondent was entitled to a return of its payment for the lease. *Schlicker v. Hemenway*, 110 Cal. 579, 42 P. 1063, 52 Am. St. Rep. 116; *Hellman v. Merz*, 112 Cal. 661, 44 P. 1079.

The following facts appear from the stipulation: L. V. Olcese died intestate on August 20, 1929, having been a resident of and leaving an estate in Kern county. He left as heirs a brother, three sisters, and others of no present concern. On August 28, 1929, the brother and two sisters, and, on August 30, 1929, appellant, as nominee of the third sister, separately petitioned the superior court of Kern county for letters of administration. After hearing the two petitions, the superior court, on September 12, 1929, made its order denying the first and granting that of appellant, to whom, on the same day, after qualification, letters of administration were issued. The brother, a week later, appealed to the Supreme Court from this order without requesting a writ of supersedeas. On September 21, 1929, upon appellant's petition therefor, the superior court, by an order reciting that notice of the hearing had been dispensed with as unnecessary, appointed it as special administrator with the powers of a general administrator. Special letters were issued the same day to appellant, who thereafter and until June 7, 1930, acted thereunder. On March 28, 1930, the Superior Court after due and regular proceedings under said section 1579 authorized appellant, as special administrator, to lease lands of the estate to respondent, and appellant, in consideration of the receipt of \$4,800, executed the lease in question. The Supreme Court on August 30, 1930, reversed the order appointing appellant general administrator (*Estate of Olcese*, 210 Cal. 262, 291 P. 193), and, on October 27, 1930, annulled the

order appointing it special administrator (*Olcese v. Superior Court*, 210 Cal. 566, 292 P. 964).

[2-4] "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. *Smith v. Westerfield*, 88 Cal. 374, 379, 26 P. 206." *Estate of Strong*, 119 Cal. 663, 666, 51 P. 1078, 1079. The facts of the death of the intestate and of his residence within Kern county gave the superior court of that county jurisdiction of the subject-matter of his estate. *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. That jurisdiction was acquired by virtue of the petitions for letters of administration. *Middlecoff v. Superior Court*, 149 Cal. 94, 97, 84 P. 764. Jurisdiction sometimes means authority over the subject-matter, but it also frequently means authority to do the particular thing done. *Spreckels S. Co. v. Industrial Acc. Comm.*, 186 Cal. 256, 260, 199 P. 8. Although jurisdiction over the subject-matter of the estate authorized the appointment of an administrator, yet, since various provisions of the Code of Civil Procedure provided the exclusive method for the exercise of such authority, an appointment contrary to the applicable provisions would be in excess of the court's jurisdiction. The Supreme Court reversed the order of appointment because it violated section 1365 of such Code which gave the brother and sisters a preference over a nominee of one sister. *Estate of Olcese*, supra. It annulled, for want of jurisdiction, the order appointing the special administrator, because notice of the application for such appointment had not been given in compliance with section 1412 of this Code. *Olcese v. Superior Court*, supra.

[5,6] Because of the similarity in the procedure for a lease, as stated in said section 1579, with that provided for a sale by section 1537 of the same Code, before its repeal in 1919, it would seem that the rule, under the latter, as to the jurisdictional necessity of a petition in the case of a sale should be equally applicable in the case of a lease. Under that former procedure, jurisdiction of the sale proceedings came from the filing of the petition and not from the general jurisdiction of the court over the administration of the estate. 11 Cal.

Jur. 901. Subdivision 1 of section 1579 restricts permission to apply for an order to lease realty of a decedent's estate to the administrator, executor, or a person interested in the estate. The presentation of a petition by an authorized person is a jurisdictional fact and, if the court erroneously grants the petition of an unauthorized person, its order is void and cannot support a lease. Freeman, Void Judicial Sales, § 10. An attempted sale of land by one who assumes to act as administrator, but who has not been regularly appointed, and who has not given the bond and qualified and received letters as such, is void, even if the sale is ordered and approved by the probate court. Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656. Respondent solely attacks the validity of the lease on the ground that, since the order appointing appellant as special administrator was void, it lacked authority to execute it. Appellant seeks to supply any such want of authority by claiming that it also acted as general administrator in such execution. The stipulated facts bar such claim for they show that appellant did not act as general administrator after the appeal from the order appointing it general administrator had been perfected and that it, as special administrator, sought and obtained permission to lease. Legally, the claim is equally untenable because that appeal suspended its authority as general administrator (Estate of Stough, 173 Cal. 638, 161 P. 1), and such suspension made possible its appointment as special administrator (Estate of Chadbourne, 14 Cal. App. 481, 112 P. 472; Estate of Heaton, 142 Cal. 116, 75 P. 662).

[7-12] The proceedings in certiorari, which resulted in an annulment of the order appointing appellant special administrator (Olcese v. Superior Court, supra) was a direct attack upon that order. (Miller v. Superior Court, 84 Cal. App. 605, 258 P. 614). The present case involves a collateral attack upon that order. Baxter v. Boege, 173 Cal. 589, 160 P. 1072; Baldwin v. Stewart, 218 Cal. 364, 23 P.(2d) 283. The same presumption as to jurisdiction attaches to decrees in probate proceedings upon collateral attack as to other judgments of the superior court, as a court of general jurisdiction. Burris v. Kennedy, 108 Cal. 331, 41 P. 458. To be attackable collaterally for lack of jurisdiction, the order must be void on its face and it is not void on its face unless the record affirmatively shows that the court was

without jurisdiction to make the order. Hogan v. Superior Court, 74 Cal. App. 704, 241 P. 584. If the record discloses that the court had no jurisdiction to make the order of appointment, then it is void and can be attacked at any time. Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370; Pearson v. Pearson, 46 Cal. 609. The order, a copy of which is attached to the stipulation, recites that "in the judgment and opinion of the court, no notice of the application for this order is necessary and such notice is now hereby dispensed with." Since notice was required to obtain jurisdiction (Olcese v. Superior Court, supra), the order is void on its face. Such an order may be attacked any time or anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity and can be neither a basis nor evidence of any right whatever. Estate of Pusey, 180 Cal. 368, 181 P. 648. A judgment void on its face is a nullity and all acts performed under it are void. Kreiss v. Hotaling, 96 Cal. 617, 31 P. 740. We are satisfied, therefore, that the lease was void.

[13-15] To validate the void lease, appellant relies upon the last two sentences of said section 1579, which read in part as follows: "Jurisdiction of the court to administer the estate of the decedent * * * shall be effectual to vest such court and judge with jurisdiction to make the order for the lease. * * * No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof." The court had jurisdiction to administer the estate, but, because of failure to give the notice required by statute, it never acquired jurisdiction to appoint appellant special administrator. Monk v. Morgan, 49 Cal. App. 154, 159, 192 P. 1042. Appellant was not authorized to file a verified petition and, without such petition, the court did not have jurisdiction to make the order for the lease. Wills v. Pauly, 116 Cal. 575, 48 P. 709. The literal wording of the first sentence, above quoted, would appear to supply the lack of jurisdiction to make the order for the lease by means of the jurisdiction to administer the estate. Although this provision has been in effect since its adoption in 1887, its meaning and effect seem never to have been declared by the appellate courts of this state. In considering a statute worded identically, except as to a few minor differences, the Supreme Court of Montana,

in *State ex rel. Shields v. Second Judicial District Court*, 24 Mont. 1, 60 P. 489, 493, said: "If the court could grant them a lease under these circumstances, then it could, of its own motion, without any application or notice, or hearing, grant a lease to any person making it known that a lease was desired. This the court could not do. Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute. *State v. Second Judicial District Court*, 18 Mont. 481, 46 P. 259; In *re Higgins' Estate*, 15 Mont. 474, 39 P. 506, 28 L. R. A. 116. Jurisdiction over the estate, and the power arising therefrom to make the order for a lease, inure to the benefit of the lessee only when they have been invoked by proper application. The error, omission, or irregularity referred to in the latter part of subdivision 6 of the statute, upon which counsel relies for a justification of the order of June 10th, certainly does not warrant dispensing with a verified petition by some authorized person, and notice to all parties interested. The order of the district court made and entered on June 10th must be annulled." In *Pryor v. Downey*, supra, 50 Cal. 388, at page 398, 19 Am. Rep. 656, the Supreme Court "expressed the opinion that the words 'defects of form, omissions or errors,' as used in the act of April 2, 1866, validating probate sales of realty, "did not embrace a want of power in the person assuming to act as administrator, or the absence of jurisdiction in the court which ordered the sale." The Supreme Court of Oregon reached the same conclusion as to the effect of a similar curative statute in *Browne v. Coleman*, 62 Or. 454, 461, 125 P. 278, 281, as follows: "It is claimed that the curative statute (section 7156, L. O. L.) bars the right of defendants in this case, but such statute is limited in its operation to 'irregularities, defects or informalities,' and it is evidently not intended to extend to sales which are absolutely void, and such has been the holding of this court (*Mitchell v. Campbell*, 19 Or. 198, 24 P. 455; *McCulloch v. Estes*, 20 Or. 349, 25 P. 724; *Fuller v. Hager*, 47 Or. 242, 83 P. 782, 114 Am. St. Rep. 916)." A statute, curing irregularities in administrators' sales did not cure a sale which was void for want of jurisdiction to order the sale because of absence of notice to minor heirs and failure to appoint a guardian ad litem as required by law. *Ball v. Clothier*, 34 Wash. 299, 75 P. 1099.

To give to the above-quoted portion of said section 1579 the broad effect, for which appellant contends, would extend it beyond the limits to which a curative statute may constitutionally go. St. 1931, p. 1409, purporting to validate all previous orders appointing special administrators without notice, upon which appellant also relies, is vulnerable to this same constitutional objection. "These [curative statutes] generally cure merely those defects which do not concern jurisdictional steps and it is usually held that they cannot constitutionally operate to give effect to a sale which is void for want of jurisdiction." 24 C. J. 694. In view of the large powers of a special administrator, as in this case, some reasonable notice to persons interested in the estate prior to his appointment should be required. *Olcese v. Superior Court*, supra. A total lack of jurisdiction due to absence of notice sufficient to constitute due process of law cannot be cured by a curative statute. *Miller & Lux, Inc., v. Secara*, 193 Cal. 755, 227 P. 171. An act of the Legislature, purporting to validate an order directing a sale of real estate which was void for want of jurisdiction or to validate the sale made under such order, is unconstitutional because it is an attempted exercise of judicial power by the Legislature and contravenes due process of law. *Pryor v. Downey*, supra. Since a sale of real estate by an administrator divests the heirs of the title which vested in them at the intestate's death, an order for such sale can only be made after notice to them, otherwise the property would be taken without due process of law and therefore a retrospective statute cannot validate a sale without such notice. *Lamont v. Vinger*, 61 Mont. 530, 202 P. 769. This case is particularly in point for the probate procedure there construed was borrowed from this state and the reasoning is mainly based upon California cases. An order for an administrator's sale of realty, made before the expiration of the time allowed by a citation for the heirs' appearance, was void for want of jurisdiction and was not validated by a statute, whose wording apparently did so, because to give such effect to that statute would divest the heirs of their title without due process of law. *Stadelman v. Miner*, 83 Or. 348, 155 P. 708, 163 P. 585, 983.

[16] Appellant invokes the doctrine of caveat emptor to defeat respondent's recovery. This doctrine is applicable in so far as the estate's title to the demised prop-

erty is concerned. Appellant leased such title as the decedent had at his death and it was respondent's duty to ascertain before bidding, the nature of that title, for it could not, after confirmation, complain of any defects therein. *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643; *Blankenship v. Whaley*, 124 Cal. 300, 57 P. 79; *Miller & Lux v. Gray*, 136 Cal. 261, 68 P. 770; *Estate of Verwoert*, 177 Cal. 488, 171 P. 105. But, as was said in *Herdlicka v. Evans*, 165 Iowa, 207, 214, 145 N. W. 84, 86: "The defect here does not rest in the title held by the parties whom the administratrix represented, but inheres in the defective proceedings upon which the right of the administratrix to convey the title contracted for, rests. The rule of caveat emptor does not therefore apply." The doctrine is generally held to be inapplicable to a void probate sale. *Ware v. Houghton*, 41 Miss. 370, 93 Am. Dec. 258; *Bowles' Guardian v. Johnson*, 218 Ky. 221, 291 S. W. 29; *Fletcher v. Rickey*, 114 Fla. 563, 154 So. 147; *Zufall v. Peyton*, 26 Okl. 808, 110 P. 773, 29 L. R. A. (N. S.) 740. Since a sale, void for want of jurisdiction, does not divest the heirs of title, the doctrine is not applicable, for otherwise the heirs would both retain the title and receive the purchase price. *Zufall v. Peyton*, supra.

[17-19] It was stipulated that in October, 1931, appellant and all the heirs executed a written agreement by which the heirs ratified all the acts of appellant, as administrator. This action, appellant argues, validated the lease and therefore prevents respondent's recovery of the consideration paid therefor. Void probate sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. *Freeman*, *Void Judicial Sales*, § 50. The principles of estoppel have often been applied to void probate sales. *Ions v. Harbison*, 112 Cal. 260, 44 P. 572; *McKeeby v. City of Los Angeles*, 125 Cal. 639, 58 P. 263; 11 R. C. L. 389 et seq. However, this agreement, to which respondent was not a party, could not adversely affect its rights because section 2313 of the Civil Code provides: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." See *Krumdick v.*

White, 107 Cal. 37, 39 P. 1066. The following additional facts, appearing in the stipulation, clearly negative any estoppel as to respondent. From correspondence between the parties, it appears that on November 4, 1930, appellant notified respondent that the decision in *Olcese v. Superior Court*, supra, abrogated the lease, that, thereafter, over several months, respondent made repeated demands, first, for a valid lease and then, on failure to receive it, for its money, that on April 2, 1931, appellant advised respondent of the filing of its account and suggested that it participate in its settlement, and that, in reply, respondent warned appellant that it would be held responsible for the money and suggested that any doubt as to who was entitled to the money be determined in an interpleader action. Although appellant's account, which included the money here involved, was settled and approved, the record is silent as to appellant's ever having paid the money to the administrators who succeeded it. A competitor of respondent between February 6 and March 3, 1931, drilled for oil on a location one-half mile from the leased land and in April, 1931, abandoned its well as a failure. Respondent never knew of the invalidity of appellant's appointment as special administrator until notified by appellant and never exercised any rights under the lease, except to record it.

[20,21] Appellant finally contends that respondent is concluded by the order settling and approving the account because it included an accounting of the bonus for the lease. Section 927 of the Probate Code permits any person interested in the estate to except to and contest an account. Section 931 of the same Code provides that the order settling and allowing the account is conclusive against all persons interested in the estate. Since respondent was not a person interested in the estate, it could not contest the account nor was it bound by the order of settlement. The probate court in the settlement of an account has no jurisdiction to determine the rights of those claiming adversely to the estate (*Estate of Burdick*, 112 Cal. 387, 44 P. 734) nor can it confirm a previous sale (*Estate of Richards*, 154 Cal. 478, 98 P. 528).

The judgment is affirmed.

7 Cal.App.2d 203

SHOCKLEY et al. v. ELMORE et al.

Civ. 1192.

District Court of Appeal, Fourth District,
California.

May 27, 1935.

Appeal and error ⇨786, 1126

Motion to dismiss appeal or affirm judgment on ground that appeal was taken for delay only or that questions on which decision depended were so unsubstantial as not to need further argument was denied where appellants' brief contained specifications of error requiring detailed and careful consideration by appellate court (Rules for the Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding by Joseph Shockley and another against E. H. Elmore and I. S. Lambing, individually and as copartners doing business under the firm name and style of the Elmore Lambing Oil Company. From the judgment, defendants appeal. On motion to dismiss the appeal or affirm the judgment.

Motion denied.

Hunter M. Muir, of San Diego, for appellants.

Ed. P. Sample and Wm. H. Wylie, both of San Diego, for respondents.

MARKS, Justice.

This is a motion to dismiss the appeal or affirm the judgment on the ground that "the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Sec. 3, Rule V, Rules for the Supreme Court and District Courts of Appeal.

Since the adoption of this rule, this court has regarded a motion such as this as something in the nature of a demurrer to the briefs of appellants upon the ground that they present no substantial reason for the appeal. We have declined to review the entire record as that would involve a virtual advancement of the case on the calendar if the motion were granted, or the necessity of reviewing the case twice if it were denied.

Appellants' opening brief contains twelve specifications of error which are earnestly

urged as grounds for a reversal of the judgment. A study of the briefs satisfies us that at least some of these specifications of error require detailed and careful consideration by this court. In doing this, we should have the benefit of a brief from respondents to assist us in our labors.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.



7 Cal.App.2d 211

**LANSING v. BOARD OF EDUCATION OF
CITY AND COUNTY OF SAN**

FRANCISCO et al.

Civ. 9736.

District Court of Appeal, First District,
Division 1. California.

May 28, 1935.

1. Municipal corporations ⇨211

Schools and school districts ⇨11, 133

School system of state is matter of general concern as distinguished from "municipal affair" as such term is considered in connection with chartered cities and is governed by its board of education or board of trustees, and such boards have power to employ teachers and such other persons as may be necessary to carry into effect boards' powers and duties.

2. Municipal corporations ⇨211

While as matters of tenure and compensation, which are matters that may be regulated by charter of city, members of board of education have been treated as municipal officers, yet such members, after induction into office, become officers of political subdivision of state, separate and distinct from municipality within whose boundary school district is located.

3. Mandamus ⇨79

Municipal corporations ⇨211

Schools and school districts ⇨127

Teachers and employees of board of education of city and county of San Francisco held not "employees of the city and county" within charter providing that all employees of the city and county shall be citizens and shall have been residents thereof for at least one year prior to appointment, and hence board of education could not be compelled to discharge teachers and employees who resid-

ed outside of limits of city and county (St. 1931, p. 3056, §§ 134-139; St. 1933, p. 2805, § 7).

[Ed. Note.—For other definitions of "County Employee," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Petition for writ of mandate by Frank P. Lansing against the Board of Education of the City and County of San Francisco and others. From a judgment sustaining a demurrer to the petition, plaintiff appeals.

Affirmed.

Frank B. Lorigan, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

BURROUGHS, Justice pro tem.

[1, 2] This is an appeal from a judgment made and entered upon an order of the court sustaining a demurrer to a petition for a writ of mandate. Among other things, it is alleged in the petition that there is now in the employ of the city and county of San Francisco, as members of or employees of the school department or as employees of the board of education or employees of the school district, 111 persons (giving their names and addresses) who reside outside of the limits of the city and county, in violation of section 7 of its charter, as amended in 1932 and ratified by the California Legislature in 1933 (St. 1933, p. 2805). The petition asks that the respondents be compelled to take the necessary steps and dismiss from the school service said employees, it being the contention of the petitioner that by virtue of said section 7 all employees of the city and county must reside within the territorial limits thereof. It is claimed by respondents that said section does not apply to school teachers or other certificated employees of the San Francisco elementary school district or of the San Francisco high school district, for the reason that such persons are not mentioned in said section. So much of section 7 as we deem necessary to a decision of the question presented reads as follows: "No person shall be a candidate for any elective office, nor shall be appointed as a member of any board or commission or as an officer of the City and County unless he shall have been a resident of the City and

County for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office, unless otherwise specifically provided in this Charter. All employees of the City and County shall be citizens and shall have been residents thereof, for at least one year prior to the appointment, unless otherwise specifically provided in this Charter, and members of the fire and police departments shall be citizens and shall have been residents of the City and County for at least five years next preceding appointment, and every elected officer, member of any board or commission and employee, including members of the fire and police departments, shall continue to be a resident of the City and County during incumbency of office or employment, and upon ceasing to be such resident, shall be removed from such office or employment. * * *

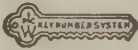
It will be observed from the above-quoted section that "all employees of the City and County" are included, also members of the fire and police departments are referred to by the name of their official organization, but there is no reference to employees of the school departments unless they are embraced within the term "employees of the City and County" of San Francisco. Whether they are included is the sole question now before the court. The school system of the state is a matter of general concern, as distinguished from a "municipal affair" as that term is considered in connection with chartered cities and is governed by its board of education or board of trustees, and said boards have power to employ teachers and such other persons as may be necessary to carry into effect its powers and duties. *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730; *People ex rel. Davidson v. Mertz* (Cal. Sup.) 39 P.(2d) 422. While as a matter of tenure and compensation, which are matters that may be regulated by the charter of a city, members of the board of education have been treated as municipal officers, yet such members, after induction into office, become officers of a political subdivision of the state, separate and distinct from the municipality within whose boundary the school district is located. *Mitchell v. Hartman*, 112 Cal. App. 370, 297 P. 77. The territory embraced within the limits of the city and county of San Francisco comprises two separate school districts, to wit, the San Francisco Elementary School District and San Francisco High School District. *Gould v. Santa Ana High School District*, 131 Cal. App. 345, 21 P.(2d) 623; *Brown v. City of Visalia*, 141 Cal. 372, 74 P.

1042; Ward v. San Diego School District, 203 Cal. 712, 265 P. 821.

[3] Sections 134 to 139, both inclusive, of the charter of the city and county of San Francisco (St. 1931, p. 3056) contain the provisions which concern the two San Francisco school districts. There is no provision among them dealing with residential requirements, and, further, in view of the fact that section 7 of the charter makes no mention of the employees of the school department and that the school districts are separate entities from the city and county of San Francisco, and under the direct control of its board of education which has full power of employment of its teachers and other employees, we are of the opinion that such teachers and employees are not included within the requirements, as to residence, laid down for the employees of the city and county of San Francisco contained in section 7 of its charter.

The judgment of the trial court is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.



7 Cal.App.2d 451

**SOUTHERN GLASS CO. v. BEVERLY
DAIRIES, Limited, et al.**
Civ. 9236.

District Court of Appeal, Second District,
Division 1, California.
June 7, 1935.

1. Pleading ⚡376

Defendant may plead inconsistent defenses, and, where one separate answer denies all of the allegations of complaint, plaintiff is not excused from making proof of material facts because of admissions of some or all of them found in other and separate answers of defendant.

2. Pleading ⚡349

In action for rent of milk bottles, admission in one defendant's answer of use of milk bottles referred to in complaint and setting up of accord and satisfaction of plaintiff's claims in codefendant's answer *held* not to entitle plaintiff to judgment, where defendants denied plaintiff's ownership of bottles, making of agreement to pay rental therefor,

and allegations as to value of reasonable use of bottles.

3. Judgment ⚡707

In action for rental of milk bottles, judgment rendered in another action *held* not competent evidence of plaintiff's title to milk bottles, where neither of defendants was a party to such action.

4. Bailment ⚡31(3)

In action for rental of milk bottles, plaintiff *held* not entitled to recover, where it proved no title or right to possession of milk bottles and offered no evidence of alleged agreement to rent milk bottles to defendants nor evidence as to reasonable value of use of milk bottles.

Appeal from Superior Court, Los Angeles County; Leroy Dawson, Judge.

Action by the Southern Glass Company against the Beverly Dairies, Limited, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

John O. Bender, of Los Angeles, for appellant.

Benjamin S. Parks, of Los Angeles, for respondent Beverly Dairies, Limited.

Oliver B. Wyman, Bronte M. Aikins, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondent Los Angeles Bottle Exchange.

SHINN, Justice pro tem.

In this action for the recovery of rent for the use of milk bottles or the reasonable value of their use, the defendants had judgment of nonsuit and the plaintiff appeals. The complaint is in three counts; the first alleging ownership of an unstated number of milk bottles and an agreement to rent the same to the defendants at the rate of \$750 per month, the second cause of action alleging their rental for the reasonable value thereof, and the third cause of action being for the recovery of the value of the use of the bottles. The prayer of the complaint was for \$3,146.75. The answers of the defendants denied all of the allegations of the complaint and set up certain affirmative defenses. In an attempt to prove ownership of the property, plaintiff introduced in evidence, without objection, a judgment in the case of Southern Glass Company, a Corporation, v. Dairy Service Co., Limited, a Corporation, by which it

was decreed that Southern Glass Company was the owner of the milk bottle brand, consisting of the initials "N M P," for use on milk bottles. Plaintiff also offered in evidence a statement of William H. Kemps, president of defendant Beverly Dairies, Limited, made at the time of the taking of the deposition of himself and E. A. Froning, a bookkeeper of said defendant, upon which occasion Mr. Kemps, in referring to milk bottles delivered to his company, stated, "I think you may assume that they were N M P bottles." The plaintiff then introduced in evidence the deposition of Froning, from which it appeared that Beverly Dairies, Limited, received from Los Angeles Bottle Exchange, its codefendant, between June 1 and October 10, 1931, 154,296 milk bottles, of which 30,960 were received in June, 65,736 in July, 12,312 in August, 34,632 in September, and 10,656 in October. For the delivery of these bottles Beverly Dairies, Limited, paid to Los Angeles Bottle Exchange cash in a total sum of \$628.41. During that period Beverly Dairies, Limited, delivered to Los Angeles Bottle Exchange 109,224 milk bottles of other brands. The Bottle Exchange charged to the Dairy Company, for bottles delivered to the latter, part of the time 2 cents, and part of the time 3 cents, per bottle. It credited to the dairy company bottles received from the latter at the rate of 2 or 3 cents per bottle. The total charges against the Dairy Company amounted to \$3,129.57. The account was balanced by the cash payments made by the Dairy Company and credits for bottles delivered to the Bottle Exchange Company.

[1,2] This is substantially all of the evidence offered in support of the several causes of action of plaintiff's complaint. From such evidence as was given on the subjects, from the pleadings and the briefs of counsel, we learn that defendant Los Angeles Bottle Exchange is engaged in the business of collecting milk bottles which stray away from their proper owners and users and returning them to their places, for which service the Bottle Exchange makes a charge to the person to whom the bottles are returned, at a certain rate per bottle. This defendant handles bottles, but does not otherwise use them in its business.

It is the plaintiff's contention on this appeal that the court should have rendered a judgment in its favor upon the foregoing evidence and upon the admis-

sions contained in certain affirmative defenses contained in the separate answers of the defendants. It is unnecessary to refer at length to these alleged admissions. The most that can be claimed in support of plaintiff's position is that one of the affirmative defenses of the dairy company admitted the use of milk bottles referred to in plaintiff's complaint, and, as to the answer of the other defendant, that it set up an accord and satisfaction of the claims of plaintiff upon which the complaint was based. The defendants at all times denied plaintiff's ownership of the bottles, the making of any agreement to pay rental therefor, as well as plaintiff's allegations as to the value of the reasonable use of the bottles. Defendant Los Angeles Bottle Exchange at all times denied making any use of the bottles in question. The so-called admissions of the answers did not aid plaintiff; they do not constitute admissions of the facts necessary for plaintiff to establish before it could recover. Furthermore, a defendant may plead inconsistent defenses, and, where one separate answer denies all of the allegations of plaintiff's complaint, plaintiff is not excused from making proof of the material facts because of admissions of some or all of them found in other and separate answers of the defendant. *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 206, 35 P. 643; *Banta v. Siller*, 121 Cal. 414, 53 P. 935; *Snipsic Co. v. Smith*, 7 Cal. App. 150, 93 P. 1035; *Light v. Stevens*, 8 Cal. App. 74, 103 P. 361; *Tustin Packing Co. v. Pacific Coast, etc., Co.*, 21 Cal. App. 274, 131 P. 338.

[3,4] The judgment against Dairy Service Company was not competent evidence of plaintiff's title to the milk bottles in question. Neither of the defendants was a party to the action in which the judgment was rendered, and as against them the judgment was inadmissible and incompetent as proof of any fact whatsoever. Plaintiff therefore proved no title or right to the possession of the milk bottles. Although alleging an express contract to rent the milk bottles to the defendants, plaintiff offered no evidence whatsoever of any such agreement, nor did it offer any evidence as to the reasonable value of the use of the milk bottles. The figures representing bottles received by the Dairy Company from the Bottle Company, admitting they were "N M P" bottles, because of the above-quoted statement of Mr. Kemps, leave in total obscurity the

actual number of milk bottles involved in the controversy. Presumably they were used from day to day by the Dairy Company.

Notwithstanding its allegations of an express contract with defendants, plaintiff established no cause of action whatsoever against either of the defendants, and its appeal from the judgment is without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 482

DEASON et al. v. JONES.
Civ. 1701.

District Court of Appeal, Fourth District,
California.
June 8, 1935.

Hearing Denied by Supreme Court
Aug. 6, 1935.

1. Infants ⇐2

Status of all persons within state is exclusively matter for state to determine.

2. Infants ⇐3

Oklahoma decree conferring on minor rights of majority concerning contracts, and authorizing him to transact business with same effect as if business were transacted by major, held not to preclude minor from disaffirming California land contract, since decree conferred personal privilege in special proceeding which was applicable only to state in which proceeding was brought and intended to enable minor to transact business therein.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Eddie E. Deason and another against Willie Jones. From a judgment for defendant, plaintiffs appeal.

Affirmed.

M. H. Broyles, of Los Angeles, for appellants.

BARNARD, Presiding Justice.

The defendant, under a statute of Oklahoma (St. Okl. 1931, § 1756) authorizing such a procedure, obtained in a court of that state a decree conferring upon him "the

rights of majority concerning contracts" and authorizing and empowering him "to transact business in general with the same effect as if such business were transacted by a person over the age of majority." He was then a resident of that state and nineteen years of age.

Thereafter he came to California and on August 31, 1931, before he had attained the age of 21 years, entered into a contract to purchase certain real property from the plaintiffs. In this action for specific performance, which followed, an answer was filed for the defendant by a guardian ad litem setting up a disaffirmance of the contract in question. Before the trial the defendant reached the age of 21 years and filed another answer in which he disaffirmed the contract on the ground that he was a minor at the time it was entered into. The court found that the defendant was a minor at the time he entered into the contract and that he had disaffirmed the same on coming of age. From a judgment in his favor, the plaintiffs have appealed.

No brief has been filed on behalf of the respondent. The appellants raise three points which are all based upon the contention that the finding to the effect that the respondent was a minor on August 31, 1931, is not sustained by the evidence and this, in turn, is based upon the claim that the decree entered by the Oklahoma court is controlling here and conclusively establishes that the respondent was not then a minor.

It is argued that the status of majority is a legal status, that the decree conferring "the rights of majority concerning contracts" established a legal status of majority with reference to the respondent, and that having been thus endowed with the "status of majority" while he was a citizen of Oklahoma, this status continued in California when he became a citizen of this state, under the familiar constitutional provision that full faith and credit must be given to the judicial records and judgments of a sister state.

[1, 2] The decree referred to did not give to the respondent a legal status of majority and did not purport to do so. It merely gave him the right to transact business with the same effect as if such business were transacted by a person who had acquired such a status of majority. This was a personal privilege conferred upon the respondent in a special proceeding applicable only to the state in which the proceeding was brought

and the purpose and intent of which was to enable him to transact business within that state and within the jurisdiction of the law authorizing such a procedure. Doubtless any state would give full faith and credit to this decree by recognizing any contract which the respondent might have made in that state in accordance with the right thus conferred upon him.

But this decree neither purported to nor did change the status of respondent while he was in another state where his actions and contracts would be governed by the laws there prevailing. The status of all persons within a state is exclusively a matter for that state to determine for itself. *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. In the exercise of a well-established right the Legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to this contract which was made in this state, and the respondent had acquired no status which exempted him therefrom.

The judgment appealed from, being fully sustained by the evidence, is affirmed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 265

FOX v. SHERWOOD.

Civ. 9811.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1935.

Rehearing Denied June 20, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Appeal and error ⇨842(7), 1011(1)

Where there is a conflict of evidence and there is evidence to support trial court's finding, question presented is one of fact and not one of law, and trial court's decision thereon is final.

2. Automobiles ⇨244(6)

In pedestrian's action for injuries received while crossing street on dark night in middle of block when struck by automobile, finding that motorist was not negligent held supported by evidence.

3. Automobiles ⇨244(50, 58)

In pedestrian's action for injuries received while crossing street when struck by automobile, evidence that night was dark, that plaintiff had on dark suit, that crossing was attempted in middle of block, and that plaintiff failed to look in direction of approaching traffic, held to support finding that plaintiff failed to use ordinary care for his own safety, which proximately resulted in injuries.

Appeal from Superior Court, Los Angeles County; Wm. J. Palmer, Judge.

Action by Theodore Fox against C. E. Sherwood. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gerald C. Riley and Edward C. Purpus, both of Los Angeles, for appellant.

Knight & Reynolds and Goodwin J. Knight, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] This is an appeal from a judgment for defendant in an action for personal injuries. Appellant's briefs consist largely of assertions of the unequivocal existence of facts upon which a reversal should be based, because under such assumptions the findings are not supported by the evidence, when in fact the record discloses that as to such facts there was a direct conflict of evidence. Thus appellant asserts, as if it were uncontroverted, that respondent was operating his automobile on the wrong side of the street, going even to the extent of declaring that respondent himself so testified, while an examination of the record discloses that respondent testified that he was driving west and that at the time appellant was struck he was on the second car track from the north, and the black-board diagram exhibit as marked by respondent shows that his car before and at the time of collision straddled the left rail of the westbound track and was wholly to the right of the center line of the street. Where there is a conflict of evidence and there is evidence to support the finding of the trial court, the question presented is one of fact and not one of law, and the decision of the trial court thereon is final.

[2, 3] The testimony amply supports the conclusion that respondent was driving his automobile at a speed of about 20 miles

per hour going west on Fifty-Fourth street between Denker street and Western avenue, in Los Angeles, and traveling at all times on the north side of the street, in the center of which were both east and west bound street car tracks; that about halfway between Denker street and Western avenue, and running south from Fifty-Third to Fifty-Fourth street, is a concrete paved walk, ending at Fifty-Fourth street; that appellant left the north curb of Fifty-Fourth street at a point where this walk meets the street, and walked partly across Fifty-Fourth street, going in a southwesterly direction, at least one of the witnesses describing his course as at an angle of 45 degrees; that, while appellant testified that he looked to the east before crossing the street, other witnesses declared that he did not; that about the time appellant reached the southerly rail of the westbound tracks respondent passed to the left of an automobile directly ahead of him, and proceeded west on the left rail of the westbound track; that respondent almost immediately thereafter saw appellant about 10 feet in front of him, and was unsuccessful in his effort to swerve far enough to the right to avoid a collision; that appellant was dressed in dark clothes; and that there were no street lights on Fifty-Fourth street between Denker street and Western avenue.

Appellant claims respondent was negligent in failing to sound his horn before passing the vehicle ahead of him, a conclusion to which we cannot agree, and fails wholly to point out how the blowing of a horn at that time would have prevented the collision or in what manner it proximately contributed thereto. Respondent was proceeding at a moderate rate of speed, lawfully passed a vehicle ahead of him, and suddenly found the pedestrian appellant about 10 feet ahead of him on the street car tracks. Bearing in mind all of the circumstances, the trial court was justified in its conclusion that respondent was not negligent. On the other hand, it seems equally clear that a pedestrian, darkly clothed, crossing a very dark street at night about halfway between intersecting streets, proceeding in a course 45 degrees away from the westward course of respondent's automobile and the car ahead of it, both with headlights burning, without such pedestrian looking in the direction of such approaching traffic, there being no

traffic approaching from the west which required his attention, and walking into the path of the oncoming automobiles—all these facts finding support in the evidence—failed to use ordinary care for his own safety, which proximately resulted in his injuries. Appellant's contention that the findings are not supported by evidence is not borne out by the record.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 436

WILLIAMS et al. v. SUPERIOR COURT,
CITY AND COUNTY OF SAN
FRANCISCO et al.
Civ. 9897.

District Court of Appeal, First District,
Division 1, California.

June 7, 1935.

Costs \$119

Undertaking to secure defendant's costs is not jurisdictional, and motion to dismiss for failure to file undertaking in time must be overruled, where it was on file when motion to dismiss was made, and court may order filing of undertaking even after motion to dismiss.

Petition by Oliver J. Williams and another for a writ of mandate to be directed to the Superior Court, City and County of San Francisco, etc., and another, to compel such court to quash the summons on a suit for libel, for the reason that no undertaking was filed prior to the issuance thereof.

Petition denied.

H. G. McKannay, of San Francisco, Wyckoff, Gardner & Parker, of Watsonville, and Chapman, Trefethen & Chapman, of Oakland, for petitioner.

PER CURIAM.

Petition for mandamus to compel the lower court to quash the summons on a suit for libel for the reason that no undertaking was filed prior to the issuance there-

of. The giving of the undertaking is not jurisdictional. Where a proper undertaking is on file when the motion to dismiss for failure to file it in time is made, the motion must be overruled. Even after the motion to dismiss, the court may order the filing thereof. The bond is intended to secure the costs of defendant, and this object is accomplished if, when the objection is made, an undertaking is executed. *Becker v. Schmidlin*, 153 Cal. 669, 96 P. 280.

For the reasons given, the petition is denied.



7 Cal.App.2d 366

UNIVERSAL PICTURES CORPORATION

v. ROY DAVIDGE FILM LABORATORY, Limited, et al.
Civ. 5339.

District Court of Appeal, Third District,
California.

June 3, 1935.

1. Corporations ⇨388(4)

In action for royalties under license for use of motion picture film developing machine which was granted to partnership of which corporation was member, two stockholders, who owned all the stock in corporation and with whose approval partnership was formed, would be estopped from claiming that act of corporation in entering into partnership was ultra vires.

2. Corporations ⇨379

Corporation may enter into partnership if so authorized by articles of incorporation.

3. Corporations ⇨379

Act of corporation in entering into partnership held not ultra vires in absence of showing that corporation was not so authorized by articles of incorporation, where contract was for benefit of corporation, since it would be presumed that contract was made in proper exercise of corporate powers.

4. Bailment ⇨7

Assignment of license for use of motion picture film developing machine without licensor's consent, in breach of license agreement, was not void, but only voidable at option of licensor, who might elect to waive breach, accept assignment, and enforce con-

tract, and when he so elected, assignee took license as of date of assignment.

5. Corporations ⇨30(6)

Corporation which succeeded partnership and received assignment from partnership of license for use of motion picture film developing machine held not liable for royalties accruing while license was held by partnership, where one of members of partnership sold its interest outright to corporation and several persons not previously connected with partnership became stockholders of corporation, owning approximately one-third of capital stock.

6. Corporations ⇨30(6)

Pleadings and evidence held not to show that assignment of license for use of motion picture film developing machine by partnership to corporation which succeeded partnership was fraudulent, so as to render corporation liable for royalties accruing while license was held by partnership.

7. Bailment ⇨7

Assignee of license for use of motion picture film developing machine held not liable for royalties accruing before date of assignment or after assignee abandoned machine and contract.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by the Universal Pictures Corporation against the Roy Davidge Film Laboratory, Limited, and others, wherein defendants filed cross-complaints. From a judgment for plaintiff, defendants appeal.

Affirmed in part; reversed in part and remanded.

Mitchell, Silberberg & Knupp, Lester E. Hardy, Edward J. Cotter, and Arch. G. McLay, all of Los Angeles, for appellants.

Louis M. Lissner and I. H. Prinzmetal, both of Los Angeles, for respondent.

Mr. Justice pro tem. COATS delivered the opinion of the court.

The plaintiff on May 10, 1930, under a license agreement rented to the defendant Roy Davidge Film Laboratories, a machine for developing motion picture films, known as the Hunter Pierce Developing Machine. The Roy Davidge Film Laboratories was a partnership composed of the defendant Roy Davidge, and the defendant Universal Pictures Corporation, whose entire stock was owned by the defendants Sol Lesser and M.

Rosenberg. After the making of the contract, the defendant Roy Davidge Film Laboratory, Limited, was organized and purchased the property of the partnership. Default having been made in the payment of royalty, plaintiff brought this present action, and recovered judgment against the defendants Lesser and Rosenberg for \$5,094.65, based on their stockholders' liability and against the other defendants for the sum of \$10,189.29, from which judgment several of the defendants have appealed.

The defendants by their answers and cross-complaints set up defenses and causes of actions based on alleged misrepresentations made to induce the execution of the contract, alleged breach of the provisions of the agreement whereby plaintiff warranted the machine was "reasonably capable of performing the function for which it was intended," and alleged breach of the provisions of the agreement whereby plaintiff agreed that it would notify the licensee of certain improvements upon the machine. The findings of the court were in favor of the plaintiff upon these issues. These findings are supported by substantial evidence and will not be disturbed upon appeal.

[1] On this appeal the defendants Principal Pictures Corporation, Sol Lesser, and M. Rosenberg now urge for the first time that the act of the Principal Pictures Corporation in becoming a member of the partnership, the Roy Davidge Film Laboratories was ultra vires, in that the powers of a corporation must be exercised by its board of directors, and if it be permitted to enter into a partnership, its stockholders are deprived of all choice in the selection of those who will manage its business, as the other partner or partners could effectually bind the corporation in partnership transactions. The Principal Pictures Corporation is a corporation with only two stockholders, the defendants Sol Lesser and M. Rosenberg each owning one-half of the capital stock. There appears to have been no other person associated with the corporation and in much of the oral testimony the witnesses referred to Lesser and Rosenberg instead of naming the corporation. It appears that any act taken was done with the affirmative approval of every one connected with the corporation. Under the circumstances the defendants Lesser and Rosenberg would ordinarily be estopped from claiming that the act of entering into the partnership was ultra vires. *Standard Oil Co. v. Woolner*, 113 Cal. App. 66, 298 P. 77.

[2, 3] A corporation may enter into a partnership if so authorized by its articles of incorporation. *Mervyn Investment Co. v. Biber*, 184 Cal. 637, 194 P. 1037. There is nothing in the evidence to indicate that the corporation was not so authorized. The contract was for its benefit and, until the contrary be shown, it will be presumed that it was made in the proper exercise of its corporate powers. *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609.

The court found "that subsequent to February 24, 1931, and prior to the institution of this action, defendant Roy Davidge Film Laboratory, Ltd., a corporation, assumed and agreed for the use and benefit of plaintiff, to be bound" by all of the promises and agreements of the partnership contained in the license agreement. The defendant Roy Davidge Film Laboratory, Limited, claims that this finding does not find support in the evidence. The finding is in part erroneous and by reason of this fact a larger judgment was rendered against this defendant corporation than is justified by the evidence. The contract was entered into May 10, 1930, between plaintiff and the defendant Roy Davidge Film Laboratories, a partnership composed of the defendant Roy Davidge and the defendant Principal Pictures Corporation. On February 29, 1931, the Roy Davidge Film Laboratory, Limited, was organized and some time thereafter it purchased the physical assets of the partnership. The stockholders of the corporation were Roy Davidge, who owned two-thirds of the stock of the corporation, and another Mr. Davidge, Earl Rodman, John Jasper, and Judge Hardy, who together owned the remaining one-third of the stock. The corporation Principal Pictures Corporation and its two stockholders, Lesser and Rosenberg, retired entirely. The precise time when the corporation took over and began operating the business cannot be ascertained from the evidence, but it is clear that it was not earlier than about the end of the first year of the license agreement. Of the judgment rendered, \$2,589.29 was for royalties that accrued during the first year, and the balance for royalties accruing thereafter. It further appears that no use was made of the machine after the middle of May, 1931. Neither the partnership nor the corporation informed the plaintiff of the transfer, but continued to deal with the plaintiff as if the transfer had not been made. Plaintiff did learn of the

transfer before the commencement of this action and elected to bring this action for unpaid royalties against the defendants named.

Most of the cases dealing with questions of this nature have to do with leases of real property between landlord and tenant. Such leases are, however, personal property and the principles of law declared in such cases are applicable to cases of this nature. *Potts Drug Co. v. Benedict*, supra.

[4-6] The evidence is undoubtedly sufficient to support a finding that the corporation Roy Davidge Film Laboratory, Limited, became the assignee of the corporation. The agreement contains the provision that the license is personal and non-assignable without the written consent of the plaintiff. This does not, however, render the assignment void, but only voidable at the option of the lessor, and he may elect to waive the breach, accept the assignment, and enforce the contract according to its terms. *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 14 P.(2d) 758, 85 A. L. R. 917; *Buchanan v. Banta*, 204 Cal. 73, 266 P. 547; *Potts Drug Co. v. Benedict*, supra. When the lessor elects to accept the assignment, the assignee takes the term as of the date of the assignment. *Garcia v. Gunn*, 119 Cal. 315, 51 P. 684. In the absence of fresh contractual relationship between the assignee and the lessor, the assignee does not become liable for a breach of a covenant before he acquired the estate or after he has parted with it or ceased to enjoy its benefits. There is no privity of contract in such case between the lessor and the assignee. *Farber v. Greenberg*, 98 Cal. App. 675, 277 P. 534. The assignee is only liable for the rental or royalty during such time as he remained in possession of the property and received the benefits thereof. *Bonetti v. Treat*, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151. There were no transactions between the plaintiff and the assignee. Plaintiff was not a party to or in any way benefited by the assignment, and if the assignee did assume to pay and discharge the obligations of the lessee, such a contract could be enforced only by the lessee. *Bonetti v. Treat*, supra.

Plaintiff argues that the finding of the court may be supported on the ground that such a close identity exists between the partnership and the corporation, that the change in form may be disregarded, and the corporation held liable for the partnership debts. There is in this case no such identity. One of the members of the partnership sold its interest outright to the corporation and retired entirely. Several persons, not previously connected with the partnership, became stockholders of the corporation, owning approximately one-third of the capital stock thereof. Plaintiff's argument is really directed to the proposition that where a transfer of property is fraudulent or prompted by motives of dishonesty or intended to commit a fraud, the corporate entity should be disregarded. This is, of course, the law (6 Cal. Jur. 591), but no such issue is presented by the pleadings or appears from the evidence.

[7] Under the evidence in this case the defendant Roy Davidge Film Laboratory, Limited, is liable for the royalty that accrued while it possessed the property in question, but not for royalties accrued before the date of the assignment, or after it abandoned the machine and contract. The exact period over which the defendant's liability extends cannot be determined from the evidence and the case must be remanded for that reason. The case was, however, fully tried and all other issues determined, and it will not be necessary to redetermine these other issues.

The judgment is affirmed as to all the defendants, except the defendant Roy Davidge Film Laboratory, Limited.

The judgment as to the defendant Roy Davidge Film Laboratory, Limited, is reversed, but only as to the issue of the amount of royalty owing from said defendant to plaintiff, and upon all other issues said judgment is affirmed. The action is remanded to the superior court to take testimony in regard to this issue, and to render its judgment in accordance with the views herein expressed.

We concur: PLUMMER, J.; PULLEN, P. J.

7 Cal.App.2d 490

SWEETWATER FRUIT CO. OF CALIFORNIA, Inc., v. SWEETWATER WATER CORPORATION.

Civ. 1122.

District Court of Appeal, Fourth District,
California.

June 8, 1935.

1. Waters and water courses ☞152(8)

Evidence held to entitle plaintiff to judgment quieting title to water for irrigation purposes by reason of adverse possession where court found that use of water by plaintiff was with knowledge, consent, and permission of defendant, and was not adverse.

2. Appeal and error ☞1071(5)

Where court's findings, sustained by evidence, showed that plaintiff's use of water for irrigation purposes was not adverse to defendant, findings as to rights of defendant in water could be disregarded.

3. Appeal and error ☞1071(6)

Where trial court findings, sustained by evidence, showed that plaintiff's claim to water for irrigation purposes was not adverse to defendant, plaintiff held not prejudiced by failure of trial court to find quantity of water pumped from river sands with express or implied consent of defendant.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Sweetwater Fruit Company of California, Incorporated, against the Sweetwater Water Corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert B. Burch, of San Diego, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, Philip Storer Thacher, of El Cajon, and Lester J. Penry, of San Diego, for respondent.

MARKS, Justice.

This is an action to quiet title to 17½ miner's inches of water once pumped from the sands of the Sweetwater river and used for domestic and irrigation purposes by plaintiff. It bases its claim upon adverse possession and use during the years 1898 to 1904, inclusive. The trial court found that the use had taken place, but that it was not adverse, but with the permission and consent of defendant.

Plaintiff contends that the findings of fact are not supported by, and are contrary to, the evidence. As particular grounds for reversal, it urges that the following findings have no evidentiary support: (1) The use of water claimed by plaintiff was open, peaceable, uninterrupted, notorious, and with the knowledge, consent, and permission of the defendant. (2) The use of the water by plaintiff was not adverse, but, on the contrary, the pumping by the plaintiff relieved defendant from the necessity of supplying plaintiff's lands with water at a time when its reservoir was nearly empty and the water supply inadequate to supply its service area, and the use of such waters by the plaintiff was permitted and welcomed by defendant. (3) All the water rights of the Sweetwater river within the Rancho de la Nacion, since June 9, 1869, were and are owned by the defendant's predecessors in interest and the defendant. (4) It is, however, impossible, from the evidence presented, to determine the quantity of water so pumped and used by plaintiff.

The properties now owned by the respective parties have seen numerous changes in ownership during the years covered by the evidence in this action. We will not concern ourselves with these changes, but will generally refer to the properties of plaintiff as though it had been the sole owner of them, and will deal with the properties of defendant in the same manner.

Defendant is a public utility supplying water to its consumers from a reservoir formed by a dam on the Sweetwater river. Its water rights date back to the title of its predecessor in interest acquired in 1869. Plaintiff owns land devoted to citricultural purposes. This land was furnished with water by defendant from its reservoir prior to 1898 and after 1904. The intervening years were a period of drought and sufficient water was not available to furnish the requirements of defendant's consumers. Plaintiff installed pumps in the bed of the Sweetwater river and pumped water onto its lands and there used it. After 1904 the pumping was discontinued, and plaintiff again obtained its water from defendant. During the pumping period, the land on which the pumping was done belonged to defendant. It later was acquired by plaintiff. This deed reserved to defendant all subterranean waters under

the land, the right to drill wells to tap these waters and the right to convey the waters from the places where they were pumped to other lands.

The evidence on the nature of the rights exercised by plaintiff in pumping and using the water during the years here in question is very sketchy. From it the trial court was justified in drawing the conclusion that defendant was glad to have any of its consumers, including plaintiff, pump water from its lands and thus save their trees and crops, as defendant could not furnish them with water from its customary source of supply; that the pumping was done with the tacit, if not express, consent of defendant, and that the use by plaintiff and the other farmers was neither adverse nor hostile to the rights of defendant.

It is of interest to note that as soon as nature had replenished defendant's water supply so that it could furnish its consumers with water from its reservoir, plaintiff discontinued pumping, obtained its water supply from defendant, and did not assert any claim of title to water in the river sand until this action was filed almost 29 years after its pumping operations had ended. It is also important to note that in 1913 plaintiff purchased the land from which the water had been pumped and accepted a deed from defendant which reserved to defendant the subterranean waters and the right to drill wells, pump water, and remove it from the land. If plaintiff had acquired any right in or title to any of these subterranean waters, or believed it had done so, that was the time to assert its claim. If it believed it had acquired title to any of these waters, it is strange that it should have purchased the land and accepted a deed which reserved these same waters to defendant.

[1-3] We are of the opinion that the evidence supports the questioned findings which we have summarized and numbered one and two. As the pumping operations of plaintiff were neither adverse nor hostile to the rights of defendant, its case must fail, as it acquired no rights in the water by adverse possession. This makes it unnecessary for us to consider the questioned findings which we have numbered three and four, because they become entirely immaterial and may be disregarded. If plaintiff had no interest in the water it is none of its concern if the trial court gave defendant more rights than those to

which the evidence and pleadings entitled it. For the same reason, plaintiff cannot be injured by the failure of the trial court to find the quantity of water pumped from the river sands with the express or implied consent of defendant.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



7 Cal.App.2d 214

PEOPLE v. FLANAGAN et al.

Cr. 1842.

District Court of Appeal, First District,
Division 1, California.

May 28, 1935.

Hearing Denied by Supreme Court
June 27, 1935.

Criminal law ⇨ 1218

Under statute providing that no person should be sentenced to county or city jail for period in excess of one year, where defendants were convicted on two counts for violations of Juvenile Court Law, sentences to county jail of one year on each count, sentences to run consecutively, *held valid* (Pen. Code, § 19a, added by St. 1933, p. 2217).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

John Flanagan and Sanford Wara were convicted of violations of the Juvenile Court Law, and they appeal.

Affirmed.

John T. McCarthy, of San Francisco (J. Bruce Fratis, of San Francisco, of counsel), for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellants were charged with violations of the Juvenile Court Law in an indictment presented by the grand jury of the city and county of San Francisco. The indictment contained five counts. Appellants pleaded not guilty to the charges, but later at the trial withdrew their for-

mer pleas of not guilty as to counts I and III and as to those two counts they pleaded guilty. Counts II, IV, and V were dismissed. The court thereupon sentenced appellants to imprisonment in the county jail for the term of one year on each count, the sentences to run consecutively.

By section 19a of the Penal Code, which was passed in 1933 (St. 1933, p. 2217), it is provided, in substance, that in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year. It is the contention of appellants that by reason of this section the judgment of the court, sentencing them to imprisonment in the county jail for one year on each count, the sentences to run consecutively, should be reversed. In support of this claim, we are cited to the case of *In re Buchanan*, 40 P.(2d) 935, Division Two, Second District Court of Appeal. That case was one on habeas corpus, where the applicant sought his release, for the reason that he was being held upon sentences under three counts of an information charging the petitioner with the issuance of checks without sufficient funds. He had been sentenced to one year on each count, the sentences to run consecutively, and the same contention was made as is here relied upon. The court held that as petitioner had not been confined for one year at the time he sued out his writ, he was not entitled to the relief sought, and the writ was denied. In the course of the opinion the court expressed the view that petitioner could not, under the circumstances, by reason of section 19a of the Penal Code, be confined for more than a year. That portion of the case, however, was mere dicta, and the decisions cited in support thereof do not support this conclusion. We do not deem a review of those cases to be necessary. On the same day, Division One of that court handed down an opinion holding directly to the contrary of that of Division Two. In *re Rozier*, 40 P.(2d) 599. In that case the court squarely held that it was proper for the trial court to sentence a defendant to one year in the county jail on each of two counts of an information charging second-degree burglary, said sentences to run consecutively, as such a judgment was not in conflict with section 19a of the Penal Code. We are of the opinion that the *Rozier*

Case states the true rule. Two or more offenses may be charged under separate counts in the same indictment. They are separate and distinct offenses, whether charged in separate counts in an information or indictment containing several counts, or in separate complaints filed at different times, and the punishment is in no manner affected by this procedure. In each case there are separate offenses for which punishment is to be imposed.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



7 Cal.App.2d 309

CARPENTER v. PACIFIC STATES SAVINGS & LOAN CO. et al.
Civ. 9780.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1935.

Execution ¶281

Where mortgaged property subject to judgment lien was conveyed to beneficiary under trust deed in consideration of release from liability for payment of any deficiency remaining on note after exhaustion of security, judgment creditor who purchased the property at sheriff's execution sale held entitled to rents until sale of property under trust deed, since beneficiary under trust deed had possession of property, not by virtue of trust deed, but by virtue of transfer of property in consideration of release.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by W. L. Carpenter against Pacific States Savings & Loan Company and others. From an order granting plaintiff a new trial, defendants appeal.

Affirmed.

John L. Mace, of Los Angeles (Arch R. Tuthill, of Los Angeles, of counsel), for appellants.

Frank S. Hutton and C. P. Von Herzen, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from an order granting a new trial. A note and deed of trust upon some real property signed by the Boulevard Properties, Ltd., as trustor, to the Pacific States Savings & Loan Company, as beneficiary, were executed and recorded. Later the plaintiff obtained a judgment against the Boulevard Properties, Ltd., which became a lien upon the property.

The day before plaintiff levied execution under his judgment, a contract was entered into between Boulevard, Ltd., and the Pacific Company, which, after referring to said deed of trust and to the default in the performance thereof and to the fact that said deed of trust provided in the event of default that Pacific Company was entitled to the immediate possession of the premises, together with the business conducted therein, contained in substance the following provisions: (1) Boulevard, Ltd., delivers the possession of said premises to Pacific Company; (2) all accounts receivable from rentals shall be prorated as of the date of the contract, all rentals accruing after date of contract to belong to Pacific Company; (3) Pacific Company agrees to release Boulevard, Ltd., from any deficiency upon said promissory note which may be due after the pending trustee's sale is held; (4) Pacific Company shall not be obliged to account to Boulevard, Ltd., for any rents collected for the period to the date of trustee's sale; (5) Boulevard, Ltd., shall execute a deed to said property to a nominee of Pacific Company; (6) *the delivery of said deed and the delivery of possession shall not satisfy, pay, or discharge in whole or in part any sums due or to become due under said deed of trust, but shall constitute solely the consideration for the release of Boulevard, Ltd., from any liability for the payment of any deficiency remaining upon said promissory note after all security therefor is exhausted.*

At the same time Boulevard, Ltd., executed a grant deed to said property in favor of Priscilla M. Alden, one of the defendants herein.

On the next day plaintiff levied execution on his judgment lien, and in due course purchased the property at sheriff's

sale and demanded rents from the defendants from that date forward. Approximately two months later Pacific Company purchased the property at trustee's sale under the deed of trust. Plaintiff thereafter brought his action against the defendants to recover the rents or the value thereof from the date of his purchase at sheriff's sale to the sale under the trust deed.

The trial court gave judgment for the defendants, then granted a new trial, and it is from this order the appeal is taken.

The defendants "concede that this court will not upset the ruling of the trial court in granting a motion for a new trial when there is conflicting testimony, or unless the granting of the motion was an abuse of discretion." Defendants contend that the order should be reversed because the defendants during said period were in possession of the property under the trust deed, and that a mortgagee (beneficiary under a trust deed) in possession is entitled to take the rents and apply them on the mortgage debt. The weakness of the defendants' contention is that defendants were not in possession *under the trust deed*. They took possession under the contract heretofore set out and under the deed to Priscilla M. Alden. The defendants themselves strenuously argue in the briefs that there was not a merger of the two estates in the Pacific Company. A merger would have been disastrous to it.

True, the contract states that the property is transferred to the Pacific Company pursuant to the terms of the trust deed, but this is obviously a gratuitous and erroneous conclusion in the light of the deed and the contract, parts of which for convenience we have italicized. The defendants, as such purchasers, could take only such rights as the Boulevard, Ltd., still owned, that is, its equity, which was subject to the plaintiff's lien. This equity the plaintiff purchased at the sheriff's sale. Plaintiff was then entitled to the rents until the trust deed which was senior to his rights, was foreclosed by sale.

The order is affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

**REY v. MUTUAL BEN. HEALTH &
ACCIDENT ASS'N OMAHA.**

Civ. 5209.

District Court of Appeal, Third District,
California.

May 24, 1935.

Hearing Granted by Supreme Court
July 23, 1935.

I. Appeal and error ⇐1008(1)

In action for death benefits under health and accident policy which provided for annual increase of benefit up to certain amount, wherein insurer's defense was based on letter allegedly sent to insured stating that privilege of annual increase would be denied during period for which insured paid premium, quarterly instead of annually, whether policy referred to in letter was policy sued on held for trial court.

2. Insurance ⇐615

In action for death benefits under health and accident policy which provided for annual increase of benefit up to certain amount, insurer could not defend on ground that in letter sent to insured privilege of annual increase was denied during period for which insured paid premium quarterly instead of annually where policy did not call for annual premiums, and there was no showing that letter was sent by executive officer of insurer and approval for change was not endorsed on policy.

3. Pleading ⇐291(2)

In action for death benefits under health and accident policy which provided for annual increase of benefit up to certain amount, beneficiary's failure to deny genuineness of letter set up in answer of insurer as special defense wherein privilege of annual increase was allegedly denied because of insured's failure to pay premiums annually did not preclude beneficiary from denying validity of letter, since letter was not "written instrument" within statute providing that when defense to action is founded on written instrument and copy is contained in answer, genuineness and due execution is deemed admitted unless plaintiff within given time denies by affidavit (Code Civ. Proc. § 448).

[Ed. Note.—For other definitions of "Written Instrument," see Words & Phrases.]

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by Amy Rey against the Mutual Benefit Health & Accident Association Omaha, a mutual insurance association.

From a judgment for plaintiff, defendant appeals.

Affirmed.

Clyde E. Cate, of Fresno, for appellant.

McFadzean & Crowe, of Visalia, and George F. Gill, of Tulare, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action to recover upon a policy of health and accident insurance issued by defendant association by which Dr. Charles R. Rey was insured, and in which policy plaintiff and respondent, Amy Rey, his wife was named beneficiary.

In 1933, Dr. Rey was killed in an automobile accident. The policy was issued in 1921, and provided for a death benefit of \$4,000, and contained the further provision:

"Part B.

"Annual Increase Four Hundred Dollars Per Year.

"After the first year's premium has been paid, each year's renewal of this policy shall add Four Hundred Dollars to the death benefit until the same amounts to (\$8,000.00) Eight Thousand Dollars."

It is the claim of appellant that when the policy in question was issued as of April 20, 1921, one of its officers, namely, the chief underwriter, dictated a letter to Dr. Rey which was signed, "Mutual Benefit Health & Accident Association," and attached to the policy, and the two were then mailed to Dr. Rey in the same enclosure. This letter in part reads:

"April 20, 1921.

"Dr. C. R. Rey, Tulare, California.

"* * * The policy which you applied for and which we issued calls for the payment of premiums on the annual plan, but at the request of our representative we are permitting you to carry this protection by the payment of premiums on the quarterly plan. Under the arrangement the sections under Part 'B' of your policy which refers to the 'Annual Increase' and the 'Twenty Year Privilege' will not be effective, but in all probability you will be in a position in the near future to tender your premiums on the annual plan, when

you will be entitled to the additional protection. * * *

Upon the death of the insured the company tendered to the beneficiary the sum of \$4,000, which was refused. Thereafter this action was commenced by respondent for \$8,000 under the policy.

It is conceded that the insured did not make payments upon an annual basis, but did for more than ten years pay the premiums in quarterly installments, and the policy was renewed from year to year.

The letter above referred to was set forth in full in the verified answer of defendant as a special defense. No affidavit was filed by plaintiff denying the genuineness and due execution of this instrument. It is the contention of defendant that this letter became a part of the policy and therefore came within the provisions of section 448 of the Code of Civil Procedure. Upon the trial the court found, however, that it was not true that on the 20th day of April, 1921, or at any other time, Dr. Charles R. Rey entered into an agreement set forth in the letter above referred to, and that it was not true that the letter was attached to said policy at the time the policy of insurance was delivered to Dr. Rey. The court also found that the insured paid the premiums accruing upon the policy and in all other respects paid, kept, and performed all of the agreements and conditions in said policy contained on his part to be kept and performed, and that the policy was in full force and effect at the time of the death of the insured. As a conclusion therefrom, the court directed judgment be entered in favor of plaintiff in the sum of \$8,000, together with interest thereon. It is from the judgment entered in accordance therewith that this appeal is taken.

It is the contention of appellant that the findings are not supported by the evidence. The deposition of the chief underwriter was received in evidence, wherein, in answer to certain interrogatories he testified he wrote the letter in question and attached the same to the policy of Dr. Rey, and that he personally mailed the envelope which contained the policy and the letter attached thereto. The original letter was never found among the effects of Dr. Rey, and after demand upon respondent for production of the original, appellant offered a carbon copy of the letter referred to.

[1] There is nothing in the evidence to establish the fact other than the testimony of the witness that this letter was ever attached to the policy or was ever sent to the insured, and there is no reference in the letter itself of any enclosure, nor to any particular policy either by date or by number, and the context of the letter itself refers to a policy as one, "which you applied for and which we issued," not to one then being issued or enclosed. Whether or not the policy therein referred to was the policy here in question was a matter for the determination of the trial court; a physical examination of the policy itself discloses no satisfactory evidence of any letter having been attached. The court having found adversely to appellant, that finding is binding upon us. Common knowledge, too, would seem to indicate that if the letter were intended as a rider or a modification of the policy in question, it would have distinctly referred to the policy to which it related and would have been attached thereto in some permanent and definite manner. The letter also states that the policy referred to called for payments of premiums on the annual plan, but an examination of the policy issued to the insured in this case does not seem to be one that contains such a provision. That part of the policy bearing upon the subject of payment of premiums is part "B" set forth above, and we quote further provisions found elsewhere in the policy:

"Standard Provisions. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. * * *" "2. * * * No change in this policy shall be valid, unless approved by an executive officer of the association, and such approval be endorsed herein." "(c) The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made in the application and the payment of dues of \$116.00 the first year and \$96.00 each year thereafter. * * *" "And the payment of dues, as stated above, or at such time as the Treasurer shall advise the Insured, beginning with July 1, 1921, is required to keep this policy in continuous effect. * * * (e) This policy shall not be in force until the premium is paid, and should the premium provided for herein be insufficient to meet the requirements of this policy the Association may call for the difference as required."

In the application by the insured which is attached to the policy appears the following: "16. What is the form number of policy applied for? 12D. What is the premium? \$116. 1st year, \$96.00 thereafter. * * *

[2] We are of the opinion therefore that the policy in question did not call for the payment of premiums upon the annual plan, and that any attempt, if such were made, to modify this policy by the issuance of the letter referred to would be ineffective for the reason that under paragraph 2 as quoted above there is no showing that the letter was sent by an executive officer of the company nor was such approval for a change endorsed upon the policy.

In *Burch v. Hartford Fire Ins. Co.*, 85 Cal. App. 542, 259 P. 1108, 1111, it is said: "Provisions may be incorporated into the policy by slips or riders attached thereto. Such slip or rider will be construed in connection with the printed provisions of the policy, and the entire contract harmonized, if possible, but, if there is an irreconcilable conflict, the slip or rider will control. In order, however, to form a part of the contract, the slip or rider should be referred to in the body of the policy; it is not a part of the policy merely because it is enclosed in the same envelope in which the policy is sent to insured, or because it is pinned on the policy."

[3] Appellant's contention that the failure of respondent to deny the genuineness and due execution of the letter set up in the answer of defendant as a special defense now precludes her from denying the validity of that instrument, cannot prevail. Section 448 of the Code of Civil Procedure provides that when the defense to an action is founded upon a written instrument and a copy is either contained in the answer attached thereto the genuineness and due execution is deemed admitted unless plaintiff within a given time denies the same by affidavit. We do not believe, however, that this instrument referred to is such a written instrument as calls for such denial.

In the case of *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 P. 519, it was held that a letter similar to that pleaded is not a written instrument upon which the defense is based within the meaning of section 448

of the Code of Civil Procedure. The case of *Heath v. Lent*, 1 Cal. 410, 411, is therein cited as follows: "It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument." This last case is also cited with approval in the case of *Miller v. Price*, 103 Cal. App. 650, 284 P. 1035. If the law were otherwise, the plaintiff in this action, who had never seen the original copy of the letter alleged to have been mailed to Dr. Rey, would be required to deny the due execution and delivery thereof under oath or be precluded from availing herself of any evidence produced at the trial disproving the same. The law cannot exact such an affidavit from one who had no knowledge whatever of the original letter in question.

We believe, therefore, that the findings of the court are sustained by substantial evidence and that respondent herein is entitled to recover the amount found due by the trial court.

The judgment is therefore affirmed.

I concur: THOMPSON, J.



7 Cal.App.2d 220

HOLDEN v. PATTEN-BLINN LUMBER

CO. et al.

Civ. 8655.

District Court of Appeal, Second District,
Division 1, California.

May 28, 1935.

1. Automobiles ⇨245(8)

In action for injuries to three and one-half year old child struck by automobile while crossing street, case held for jury.

2. Appeal and error ⇨1004(1)

Question of excessive damages is one first addressed to trial court which must bear practically whole responsibility in every case, and power of appellate court over excessive damages exists only when facts are such as to suggest, at first blush, passion, prejudice, or corruption on part of jury.

3. Damages ⇨132(8)

\$22,500 for injuries to three and one-half year old child resulting in disturbance

and partial paralysis with contraction deformity of left arm, impacted fracture of vertebrae, permanent disability of left arm, and definite limitation of motion in neck held not excessive.

4. Evidence ⇨237

In action for injuries to three and one-half year old boy, objection to questions as to what witness heard plaintiff's grandparents say with reference to accident held properly sustained, plaintiff not being present at time and not bound by declarations of parents or grandparents.

5. Appeal and error ⇨1056(1)

In action for injuries to three and one-half year old boy, sustaining objections to questions as to what witness heard plaintiff's grandparents say concerning accident held not prejudicial where no offer of proof was made, it was not possible to determine what defendants expected to prove, and where evidence was clearly in nature of impeachment for which no foundation had been laid.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by James Holden, a minor, by his guardian ad litem, Mrs. Harold J. Holden, against the Patten-Blinn Lumber Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Dana R. Weller, of Los Angeles, for appellants.

David L. Sefman and Rowland Fontana, both of Los Angeles (Ernest M. Torchia, of Los Angeles, of counsel), for respondent.

ROTH, Justice pro tem.

Respondent, a minor, by his guardian ad litem, brought suit for damages sustained as the result of personal injuries suffered when struck by an automobile owned by appellant lumber company and operated by one of its employees. The accident occurred on July 25, 1922, when plaintiff was three and one-half years old. This suit was filed January 8, 1932, approximately ten years later.

[1] Appellants concede the rule that an appellate court cannot disturb a judgment rendered on conflicting evidence and also that the credibility of the witnesses must be determined by the trial court or jury, but insist that because of "the lapse of

time intervening between the accident and the trial, and the interest of the witnesses testifying for plaintiff, a more than ordinary scrutiny should be given to such testimony and the statements of disinterested witnesses accorded their full reasonable value." Feeling that the request and suggestion of appellants is a fair and reasonable one, we have religiously scrutinized the record and find that the only witness who can be said to be interested, in a legal sense, who testified for respondent on the facts of the accident, was his grandfather, an eyewitness. As to the physical condition of the child before and after the accident, his mother testified. This testimony, in so far as it described the child's physical condition after the accident and his physical condition at the time of trial, was amply supported by the testimony of three doctors who cared for the child. While it may be said in a colloquial sense that the doctors were interested, they cannot be said to be interested witnesses in a legal sense and their testimony, with the exception of a description of and an opinion as to the amount of pain suffered or likely to be suffered, is of a professional, factual nature, corroborated by hospital records.

Disregarding the testimony of the child's grandfather, the preponderance of the evidence shows that a three and a half year old child had stepped off the curb and was walking east approximately 60 to 80 feet south of the intersection of Sixteenth and New Hampshire streets in the city of Los Angeles and had taken at least two or three steps into New Hampshire street when a Ford touring car owned by appellant lumber company and operated by one of its employees, appellant Haskins, proceeding in a southerly direction, was at a point north of the northerly curb line of Sixteenth street and continued at a speed of 20 to 30 miles per hour across the intersection and to the point in the street where the child was walking, the right fender or right portion of the bumper of the Ford touring car striking the child at an undetermined point between the west curb of New Hampshire and what would be the center line of the street. One eyewitness (called by the defense) testified: "I believe the man tried to avoid hitting the child because he swerved out that way." The driver of appellant's car testified: "The first time I saw the boy he was on

the sidewalk. I don't know whether he was moving or standing still. * * * I don't know how far I was from the boy when I first observed him. I paid no more attention to him." One Segner, a witness for respondent, testified, according to a summary of his testimony made in appellants' brief: "I don't know exactly where the boy was in the street when he was struck. I know he was some place in the street. I seen him walk off the curb, and he had taken several steps off the curb. I saw him step down from the curb; that is when I first saw him. I did not observe the automobile at the time I saw him step down. The boy had advanced 2 or 3 steps, perhaps more than that, when I first saw the automobile out of the corner of my eye. I just saw a flash of the automobile as it crossed the northerly intersection of New Hampshire Street. I saw the automobile strike the boy—the front right of the automobile struck him. I am not sure whether it was the fender, the wheel or the bumper. I really don't know. In my opinion the automobile was traveling more than 25 miles an hour." One Styers, a witness called by appellants, testified: "Q. Now the car passed in front of you, did it? A. Yes, he came on out past here, and I had to come to a complete stop for him to pass, Judge, because I thought I had the right of way I was going on, I was going about 25 or 30 miles an hour, and I came to a complete stop and he shot in front of me and came across here, and I came to a complete stop. I think I was talking to my wife about it, because it made me angry because he took the right of way from me, Judge, and I watched him out of here. Right about in here is where it struck this little baby." Anna Styers, wife of the foregoing witness, also called by appellants, testified: "We were driving about 20 or 25 or 30 miles an hour and this car shot across New Hampshire going south on New Hampshire, past 16th Street about 25 miles an hour, I imagine, and Mr. Styers was very much provoked, he had to put the brakes on to stop, because this chap took the right of way, and we were watching the car there because he was going so fast, and we saw him when he hit the child."

From the scant résumé of testimony which has been given, it must be clear that the conflict of the testimony was such that the verdict of the jury cannot be disturbed.

As is said in the case of *Morris v. Standard Oil Co.*, 188 Cal. 468, 471, 205 P. 1073, 1075: "In the character of cases here involved, where there is a conflict regarding the exact point or the precise manner of contact, it is not the province of the appellate court to review the conclusion reached by the judge or jury upon such testimony, if there be any rational basis for the verdict, and a finding regarding such negligence will not be disturbed on appeal. *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679; *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 191 P. 894."

The jury brought in a general verdict for \$22,500. Judgment was entered thereon. A motion for a new trial was made and denied. One of the grounds urged on the motion for a new trial was excessive damages. Appellants reassert this point now.

The rule followed by appellate courts when an appeal is on the ground that excessive damages have been given as a result of passion or prejudice is well stated in the case of *Morris v. Standard Oil Co.*, supra, 188 Cal. 468, page 473, 205 P. 1073, 1075, the court saying:

[2, 3] "The question of excessive damages is one that is first addressed to the trial court. Practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. *Bond v. United Railroads*, 159 Cal. 270-286, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 106 P. 83; *Bisinger v. Sacramento Lodge, etc.* [187 Cal. 578], 203 P. 768." *Holmes v. California Crushed Fruit Co.*, 69 Cal. App. 779, 232 P. 178; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513; *Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76; *Campbell v. Bradbury*, 179 Cal. 364, 375, 176 P. 685; *Wallace v. Pacific Electric Ry. Co.*, 105 Cal. App. 664, 288 P. 834; *Rannard v. Harris*, 113 Cal. App. 15, 297 P. 623.

The evidence shows that respondent suffered a definite injury to the bones of his neck that caused an injury to the roots of the nerves as they come out of the neck, causing a disturbance and partial paralysis with a contraction deformity of the left arm, and an impacted fracture of the

vertebræ; that the injuries to the left arm caused a permanent disability with reference to the bending or straightening out of the same; that there was a further deformity and injury to the elbow and wrist of the left arm; that there was a definite limitation of motion in the neck, with regard to the permanency of which one of the doctors testified:

"I don't think it ever will be—ever be back to normal entirely; I think it is permanent. But in my work you have to be an eternal optimist, and I feel that he will get some improvement, although I make that statement saying that I am somewhat optimistic in that. I have seen them get better by long continued effort, but it will take long continued work on his part; these joints have been damaged, and a damaged joint by long continued stretching and exercise may be improved somewhat, how much I don't think anyone can say."

One of the other doctors testified:

"Q. Now, what do you think about the permanency of the present condition, whether it is going to be a permanent condition? A. In my opinion the injury to this little boy's neck and his elbow are both of a permanent character."

As to whether or not the respondent underwent more than a usual amount of pain and suffering, the following excerpts from the testimony of one of the doctors are fair illustrations:

"The boy was placed in a plaster cast, a tremendous body plaster cast, involving the neck and the head, and the left arm was similarly treated with plaster of paris in order to immobilize it, so-called, keep it quiet. This was allowed to remain on for several months and then a brace, a body brace with a tremendous collar made of leather and steel was substituted for the plaster of paris. * * *

"Q. Do you know how long he was kept in that brace? A. Several months, I don't know exactly."

Our attention has been called to no evidence which supports the contention of appellant that the physical condition of respondent was not caused by the injuries received in the accident. All of the doctors who testified for respondent were of a contrary opinion and no evidence has been directed to our attention by appellant which supports this contention. One of the doctors testified: "The absence of tuberculosis was conclusively proved during his months of observation in the hospital."

[4, 5] Finally, complaint is made that the court erred in sustaining an objection to questions sought to elicit evidence as to what one of the witnesses heard Mr. and Mrs. Niendorf, the maternal grandparents of respondent, say with reference to the accident. We believe the objection was properly sustained. Respondent was not present at the time and could not be bound by the declarations of his parents or grandparents. 1 R. C. L. 482, § 18; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59; *Norfolk, etc., R. Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718. In any event, no offer of proof was made and it is not possible to determine what appellants expected to prove by such questions. It also is clear from the appellants' brief that the proposed evidence was in the nature of impeachment, and it is not shown that any foundation was laid therefor. Under the circumstances, we could not say, even though the evidence was improperly excluded, that there has been a miscarriage of justice by reason of the fact that objection to appellants' questions was sustained.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

CALIFORNIA REPORTER

IN VOLUME

46 PACIFIC REPORTER

SECOND SERIES

3 Cal.2d 689

**AMERICAN PHILATELIC SOCIETY et al.
v. CLAIBOURNE et al.**

S. F. 15013.

Supreme Court of California.

May 28, 1935.

1. Evidence Ⓒ5(2)

It is common knowledge that "philately," or "stamp collecting," is extensive, not only

in this country, but throughout the world, and that many hundreds of thousands of dollars are invested in stamps, the value of which lies, not in their beauty or design, but in their rarity.

2. Trade-marks and trade-names and unfair competition Ⓒ68(1)

Stamp dealer and stamp collectors held

entitled to injunction restraining offering of stamps perforated in imitation of rare, gen-

Ⓒ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

uine, perforate stamps of great value, as part of plan to enable unscrupulous dealers to make large profits by selling imitation stamps as genuine, which, if accomplished, would cast doubt upon authenticity of genuine stamps and impair, if not destroy, their market value.

3. Injunction ☞109

That defendant, furnishing others with instrument of fraud, is satisfied to take small profit and leave consummation of fraud to others *held* no defense to application for injunction, since he who induces another to commit fraud and furnishes the means is equally guilty with person who commits fraud.

4. Trade-marks and trade-names and unfair competition ☞68(1)

Essence of "unfair competition" lies in simulation and imitation of goods of a rival or competitor with purpose of deceiving unwary public into buying imitation under impression that it is purchasing goods of such competitor.

[Ed. Note.—For other definitions of "Unfair Competition," see Words & Phrases.]

5. Trade-marks and trade-names and unfair competition ☞84

That person furnishing unscrupulous stamp dealers with instrument of fraud was frank with such dealers, who were intended to sell imitation stamps as genuine stamps to collectors, *held* no defense to action by stamp dealer and collectors for injunction restraining sale of imitation stamps to stamp dealers.

6. Trade-marks and trade-names and unfair competition ☞68(1)

Rules of unfair competition are based, not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit.

7. Trade-marks and trade-names and unfair competition ☞91

That representative action to restrain furnishing of imitation stamps to dealers was brought on behalf of all stamp dealers in the United States *held* no defense to action on ground that threatened fraud could be consummated only with co-operation of unscrupulous dealers, some of whom would be parties on behalf of whom action had been brought.

8. Trade-marks and trade-names and unfair competition ☞84

That action to prevent furnishing to dealers stamps perforated in imitation of rare, genuine perforate stamps was brought by persons having imperforate stamps in their

possession *held* no defense to action on ground that such persons could also perforate their stamps.

9. Trade-marks and trade-names and unfair competition ☞91

Joinder of stamp dealer and stamp collectors as plaintiffs in action to restrain furnishing imitation stamps to unscrupulous stamp dealers *held* proper (Code Civ. Proc. § 382).

10. Appeal and error ☞917(1)

On appeal from judgment sustaining demurrer without leave to amend, allegations of complaint are taken as true.

11. Trade-marks and trade-names and unfair competition ☞97

Person offering stamps perforated in imitation of rare, genuine perforate stamps of great value as part of plan to enable unscrupulous dealers to sell them as genuine should be restrained from selling such stamps unless they are marked so as to distinguish them from genuine perforate stamps.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by American Philatelic Society and others against A. L. Claibourne and others. From a judgment for the named defendant, plaintiffs appeal.

Reversed and remanded, with instructions.

Bianchi & Hyman, of San Francisco, for appellants.

Faulkner & O'Connor, of San Francisco, for respondents.

CURTIS, Justice.

An appeal from a judgment in favor of defendant A. L. Claibourne entered on a minute order denying a motion for injunctive relief, and sustaining a demurrer to the complaint without leave to amend. The American Philatelic Society, a corporation composed of some 4,000 owners and collectors of postage stamps, many of whom are dealers therein for profit, R. H. Mower, who deals in the buying and selling of various types of postage stamps for profit, and J. M. Stahn, a private collector and owner of stamps, are joined as parties plaintiff. The gist of the complaint is that respondent has so marked and perforated

certain issues of United States postage stamps that they simulate, to the point where only experts can distinguish them, certain other issues, the supply of which is more limited and the market price of which, because of their rarity, is much greater, and has circularized practically all of the stamp dealers in the United States, thus placing upon the market for sale these stamps so marked and perforated by himself, which may be palmed off by unscrupulous dealers upon the unsuspecting public and in unfair competition with honest dealers. An injunction is sought upon the ground, not that respondent himself is attempting to palm off the counterfeited stamps as genuine, but that equity will restrain the placing of tools of fraud into the hands of dealers or vendors.

[1] We are satisfied that appellants are entitled to the aid of the court of equity to prevent the consummation of threatened fraud, and the complaint sets out sufficient grounds for injunctive relief. It is, of course, a matter of common knowledge that philately, or stamp collecting, is extensive not only in this country, but throughout the world and that many hundreds of thousands of dollars are invested in stamps, the value of which lies not in their beauty or design, but in their rarity. Any reference hereinafter made to stamps is with reference to their value as a commodity dealt in by collectors and dealers, and is entirely distinct and apart from any reference to their value as a medium of exchange or compensation for postal service.

The complaint briefly sets out the fact that the United States government sold certain stamps in a perforate condition and some similar stamps in an imperforate condition; that the stamps issued by the government in a perforate condition have, by reason of certain imperfections in perforation or other distinguishing marks, acquired by their rarity a high value, and are only available for purchase or collection through individual dealers and owners; that the stamps sold by the government in an imperforate condition are much less valuable than those issued in a perforate condition; that respondent became the owner of a large quantity of imperforate United States government stamps of the kind, type, and denomination which, if they had been of the number of those issued by the government in a

perforate condition, would have been exceedingly valuable; that respondent perforated in various combinations, or caused to be so perforated, all of his stock of stamps of this class; that such perforation "rendered each and all of said items similar and identical in form and appearance" with the stamps actually issued by the government in a perforate condition; that the action of the respondent in perforating said items of stamps in different combinations resulted in counterfeiting the same to simulate stamps theretofore issued and sold by the United States government in a perforate condition and in the creation of a supply of spurious stamps simulating the genuine variety; that respondent has prepared a circular labeled "Price List," in which are listed 55 items, which are given the same number as those given to similar items in the catalogue of Scott's Stamp & Coin Company, Limited, of New York, which catalogue was of general use in the stamp trade, and that opposite each item in one column is given the price quoted in Scott's catalogue for the particular genuine perforate stamps listed, and in a parallel column the price, which was very much lower, at which respondent would sell said spurious items; that respondent has mailed said price list, accompanied by a circular letter, to all dealers and others in the United States interested in philately with the object of flooding the market with spurious items of stamps and intending that unscrupulous postage stamps dealers shall offer these stamps for sale and sell them to the public generally as genuine perforate stamps issued by the United States government; and that "the flooding of the market by the said spurious articles results, and will continue to result, in depreciating the value of the collections of stamps owned by the plaintiffs herein and other collectors throughout the United States, and in fraud upon prospective buyers, sellers or collectors of stamps." Accompanying the complaint are three exhibits. Exhibit A consists of a copy of the price list. Exhibit B consists of a copy of the circular letter which was mailed with the price list. Exhibit C consists of a price list compiled by appellants which duplicates the price list of respondent, but contains two additional parallel columns in which are listed the catalogue number (Scott's catalogue) of the stamps issued by the government in an imperforate condition of the same variety as

the postage stamps issued by the government in a perforate condition, together with the price quoted by Scott's catalogue for such imperforate stamps. A glance at the first 5 items will serve to demonstrate the existence of a wide differential in the price of the genuine perforate stamps and the imperforate stamps. For example, a genuine perforate stamp worth \$400 is worth only \$1.20 imperforate, and is offered for \$20 by respondent after perforating it to resemble the genuine perforate stamp.

Item	Scott's Cat. No.	Scott's Cat. Price	Price offered by re- spondent	Scott's Cat. No.	Scott's Cat. Price.
1	316	\$400	\$20	314	\$1.20
2	316		\$20	314	\$1.20
3	316		\$30	314	\$3.00
4	318	\$100	\$5	314	\$1.20
5	318		\$5	314	\$1.20

[The stamps designated opposite the blanks in the third column have no reasonable market price, as they are rare, and not readily obtainable except at auctions or private or collectors' stock.]

As before explained, Exhibit A, being the price list circularized by respondent, consists of the first four columns of this latter list, including, of course, all 55 items.

[2] It is not appellants' contention that respondent intends or is attempting to deceive and directly defraud the dealers or stamp collectors who receive his price list. Although the respondent has listed therein the items under the numbers allocated in Scott's catalogue to genuine perforate stamps and did not use the number allocated in said catalogue to imperforate stamps, there is printed in fairly large type on the cover of the price list, the following words: "Mint Condition, Unofficial Separation," and on the back thereof in small type is the following statement: "All items listed are well centered and in prime mint condition. They have unofficial separation and are accurately gauged for perforation." There also appears at the top of the price list just above the items listed, "Mint Condition. Unofficial Separation." In view of the fact that the price list contains such statements, such contention would not, of course, be tenable. Appellants do contend that respondent is furnishing unscrupulous dealers with an instrument of fraud and calling their attention to it by means of the circular letter which accompanies

the price list, which letter subtly suggests by the use of language therein employed that large profits can be made by buying these spurious stamps and selling them to prospective purchasers as genuine government perforated stamps. This circular letter reads as follows:

"Many varieties of United States postage stamps, in recent years, have mounted upward to where none but the most affluent collector may possess them. This has led finally to a situation where many middle-class collectors have been forced to discontinue, through financial inability to acquire such items. As the latter class is the backbone of the stamp dealer's business and, therefore, of the most vital importance to him, please give your fullest consideration to the following:

"I have in stock, and ready for immediate delivery, such rare and elusive items as Nos. 316, 318, 319D, 321, 322, 352, 387, 388, 405A, 424A, 424B, 424C, 461, 464, 498A, 498B, 498C, 499A, 499B, 499C, 501D, 501E, 519, 554A, 554B and 611A. These items are all with unofficial separation and it is my intention that they be sold as such by dealers.

"The merest glance at the price list enclosed, which is exclusively for dealers, will demonstrate most clearly the extremely low prices at which these rare items may be sold and a handsome profit realized. You can be the first in your territory to reap the benefit. Act now—fill out and sign the enclosed order card and a lot will be forwarded you by return mail, registration prepaid."

We think this letter is susceptible to the construction placed upon it by appellants. It is conceivable that in some commodities imitations or copies of the original might have a fairly high value simply as authentic copies, but since the entire value of a particular variety of stamp lies in its rarity, it is hardly credible that even a middle-class collector would desire a recognizable counterfeit enough to pay the difference between \$1.20 and \$20. It is plainly evident that the difference in value between an imperforate stamp worth \$1.20 and an "unofficial separated" stamp priced at \$20 is not any intrinsic worth which has been added to the stamp by such unofficial perforation, but the counterfeit value in that it may be palmed off as genuine. It is also plainly evident that if respondent secures a higher price for imperforate stamps after they have been per-

forated by him so as to resemble the genuine government perforated stamps and this increased value is due to the possibility of such stamps being palmed off as genuine upon an unsuspecting purchaser, respondent has thereby obtained an advantage grounded in fraud and deceit and secured a benefit to himself to which he is not in honesty and fair dealing entitled.

There can be no question that appellants, as owners, collectors, and dealers in genuine stamps will suffer pecuniary loss if such practice is countenanced. It is self-evident that inasmuch as the market value is dependent upon the rarity of the genuine items, such practice will tend to diminish the market value of the genuine article. There being only so many of these genuine government perforated stamps in existence, it will follow inevitably that if an additional supply be put upon the market and offered at a lower price, the value of the genuine stamps will seek the level of the spurious stamps to the pecuniary detriment of the owners, dealers, and collectors who possess genuine stamps. It is also clear that if there is offered for sale spurious stamps identical with, or even so closely resembling the genuine perforated stamps that the difference can only be detected by an expert, the market for this particular variety of stamps may be materially decreased and perhaps wholly wiped out. Any practice tending to cast doubt upon the authenticity of the genuine article will tend to destroy the market for such genuine article. If prospective purchasers become aware of the fact that counterfeit articles are being sold as genuine, many may decide not to take the chance of being victimized, and may therefore abstain from buying any stamps of the particular variety in which substitutes are being offered.

[3-5] To sum up the situation, it is apparent that, if the allegations of the complaint be true, the conduct of respondent in offering for sale these privately perforated stamps will inevitably result in severe pecuniary injury to the appellants, and the gaining by respondent of an advantage arising out of, in the final analysis, duplicity and dishonesty. The fact that respondent is satisfied to take a small profit, leaving to another the actual fraud, the double-dealing and palming off, is wholly immaterial. He who induces another to commit fraud and furnishes the

means is equally guilty. *Warner & Co. v. Eli Lilly & Co.*, 265 U. S. 526, 44 S. Ct. 615, 68 L. Ed. 1161. The casebooks are replete with cases which hold that the essence of unfair competition lies in the simulation and imitation of the goods of a rival or competitor with the purpose of deceiving the unwary public into buying the imitation under the impression that it is purchasing the goods of such competitor. *Von Mumm v. Frash* (C. C.) 56 F. 830, 834; *Hostetter Co. v. Brueggeman-Reinert Distilling Co.* (C. C.) 46 F. 188, 189; *Hostetter Co. v. Becker* (C. C.) 73 F. 297; *Frischer & Co. v. Bakelite Corp.*, 39 F.(2d) 247, 260; see 84 A. L. R., annotation, pages 473, 474, 475, 476. So, likewise, it is immaterial to the charge of unfair competition that the respondent made no attempt to deceive the retail dealers and in fact frankly stated to them the true facts, that the stamps were unofficially separated. There is an abundance of cases recognizing and setting forth the well-settled rule that it is of no consequence in a charge of unfair competition that no deception is practiced on the retail dealers and they know exactly what they are getting; that the wrong lies in designedly enabling the dealer to palm off the copy or simulated article as that of the complainant. *Von Mumm v. Frash*, supra; *Warner & Co. v. Lilly & Co.*, supra; see 84 A. L. R., annotation, pages 486, 487. It is obvious that the warning as to the spurious nature of the stamps is entirely separate and distinct from the stamps and may readily be discarded. The stamps themselves, simulated to represent the genuine, tell the falsehood. We think the complaint herein sets out a case which falls squarely within the above-stated rules.

[6-8] Respondent makes no effective denial of the above propositions, but relies in the main upon the fact that most of the cases dealing with questions of unfair competition are cases wherein the complainant has been a manufacturer or producer of the article imitated or simulated, and has sought an injunction in protection of his property right in such commodity. It is, of course, but natural that the majority of cases involving unfair competition should deal with the rights of manufacturers and producers for the reason that ordinarily it would be the manufacturer or producer who would suffer the pecuniary loss if imitative articles were

sold by merchants in lieu of the producer's goods. But we see no good reason why that same protection against patently unfair practices should not be afforded to a vendor or dealer when, by reason of peculiar circumstances, such vendor or dealer is the one who will bear the loss caused by such dishonest practice. It is true that the vendors and dealers do not have the same property right that a producer or manufacturer has in a commodity, but it is also true that because of the uniqueness of the present situation, the production of the stamps by the United States government who is not interested in the philatelic aspect of the stamps and is not, therefore, interested in protecting their philatelic value, the dealers and stamp collectors do in fact have a property right somewhat similar to that of a producer which is menaced by respondent's conduct. It is also to be borne in mind that the rules of unfair competition are based, not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit. *Ely-Norris Safe Co. v. Mosler Safe Co.* (C. C. A.) 7 F. (2d) 603. It may be granted that this case is a novel one, and that it may be doubtful whether other cases in which the vendor and dealer rather than the manufacturer or producer is the one injured by unfair practices may soon arise, but the fact that a scheme is original in its conception is not a good argument against its circumvention. It has been said in the case of *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 539, 42 P. 142, 145, 30 L. R. A. 182, 50 Am. St. Rep. 57, one of the leading cases on unfair competition in this state: "The fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that 'no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive.'" When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent

to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

The argument proffered by respondent that appellants cannot have an injunction for the reason that the suit is brought on behalf of all philatelic dealers in the United States and it is evident that the threatened fraud can only be consummated with the co-operation of an unscrupulous dealer, one of the appellants, merits no discussion. Also utterly lacking in merit is the suggestion that appellants should be refused an injunction because they have in their possession imperforate stamps and may perchance perforate them to resemble government perforated stamps. If such a situation should arise, it is obvious that it can be dealt with adequately at that time. In the meantime the mere possibility furnishes no good ground for refusing to deal with a present existing unfair practice.

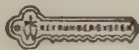
[9] Under section 382 of the Code of Civil Procedure, the several plaintiffs were properly joined. Said section provides that when the question is one of a common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

[10, 11] This opinion, dealing as it does with the correctness of the ruling sustaining the demurrer without leave to amend, is predicated upon the assumption that the allegations of the complaint are true, that is, that the unofficial separated stamps so closely resemble the genuine government perforated stamps that their falsity cannot be detected by an ordinarily careful philatelist, and that the business of selling stamps does not differ from the sale of ordinary commodities to the extent that the economic rules of commercial dealings, such as supply and demand, etc., do not apply. If appellants fail to sustain their allegations by proof, the injunction, of course, should be denied. If, on the other hand, they are able to support their allegations by proof, an injunction should issue restraining respondent from disposing of such unofficial perforated stamps unless and until the stamps themselves

be distinguished from the genuine government perforated stamps by placing such a distinguishing mark upon them as will effectively differentiate them from such genuine government perforated stamps. Respondent can have no ground of complaint against such injunctive relief. Such relief will only eliminate the unconscionable profit due to misleading the philatelic public by foisting upon it spurious stamps as genuine, and if there be any legitimate profit arising from the mere unofficial perforation of the imperforate stamps aside from the counterfeit element, it will preserve such profit to the respondent.

The judgment is reversed, and the case is remanded to the trial court, with instructions to overrule the demurrer, with the right to the respondent to answer said complaint if so advised.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.



3 Cal.2d 651

**LOS ANGELES CITY SCHOOL DIST. OF
LOS ANGELES COUNTY v. GRIFFIN,**

Secretary of Board of Education.

L. A. No. 15022.

Supreme Court of California.

May 24, 1935.

1. Statutes ☞93(6)

Legislature has power to classify school districts for legislative purposes if classification is not arbitrary but is general in character and is founded upon some natural, intrinsic, or constitutional distinction.

2. Constitutional law ☞70(2)

Legislative judgment as to what is a sufficient distinction justifying a classification for legislative purposes will not be overthrown by courts, unless it is beyond rational doubt erroneous.

3. Statutes ☞76(2), 93(6)

Section of School Code limiting operation of retirement plan for teachers of public schools to two or more school districts whose governing boards have same personnel held unconstitutional as based on arbitrary classification (School Code, § 5.940, and §§ 5.1100-

5.1138 [see Acts Supplemental to School Code, St. 1929, p. 357]; Const. art. 4, § 25, subds. 27, 33).

In Bank.

Original proceeding in mandate by the Los Angeles City School District of Los Angeles County and others against H. E. Griffin, as Secretary of Board of Education of the City of Los Angeles.

Alternative writ discharged and petition denied.

Scott & Eberhard and Ray C. Eberhard, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

PRESTON, Justice.

This is an original proceeding in mandate which attacks the constitutionality of section 5.1100 of the School Code (see Acts Supplemental to School Code, St. 1929, p. 357).

Petitioner school districts comprise the public school system of Los Angeles and certain adjacent territory which forms a part of one or the other of such districts, and they employ over 500, to wit, in excess of 10,000 teachers in their elementary and secondary schools. They seek writ of mandate to compel the secretary of the Los Angeles board of education, their governing board, to execute a contract between said board and the public school teachers' retirement salary fund board (section 5.940, School Code). The execution of said contract would mark the culmination of procedure followed by said board of education, pursuant to the provisions of sections 5.1100-5.1138, inclusive, School Code, in its effort to establish a plan for district retirement salaries for the teachers in the public schools of the districts under its control.

Respondent, said secretary of the board of education, bases his refusal to sign the contract upon the sole claim that section 5.1100 of the School Code is unconstitutional in its attempted classification of school districts, as shown by the italicized portions of the following provisions thereof: "The governing boards of *any two or more school districts having the same personnel*, in which districts *five hundred or more teachers* are employed in the elementary and secondary schools thereof * * *

shall have power * * * to elect to provide a plan or system for a district retirement salary * * * to be paid by the districts to all teachers in the public schools of such districts. * * *

To be more specific, respondent contends that the limitation (1) that two or more school districts have the same personnel, and (2) that the districts employ 500 or more teachers in the elementary and secondary schools thereof, brings the statute within the inhibitions of section 25 of article 4 of the State Constitution, which in part provides:

"The legislature shall not pass local or special laws: * * *

"Twenty-seventh—Providing for the management of common schools. * * *

"Thirty-third—* * * Where a general law can be made applicable."

Petitioners claim that said section 5.1100 is a valid enactment and that the classification therein, both as to districts and number of teachers, is one which it was within the power of the Legislature to make.

[1,2] At the outset it may be said that the Legislature has power to classify school districts for legislative purposes if the classification is not arbitrary but is general in character and is founded upon some natural, intrinsic, or constitutional distinction; also that a classification is often warranted which depends, in the last analysis, upon the population of the districts. *Grigsby v. King*, 202 Cal. 299, 260 P. 789. We also have in mind the well-known rule that the legislative judgment as to what is a sufficient distinction will not be overthrown by the courts unless it is, beyond rational doubt, erroneous. In *re Stephan*, 170 Cal. 48, 148 P. 196, Ann. Cas. 1916E, 617. Furthermore, we recognize the desirability of having a retirement plan, such as outlined in the School Code, and we realize the benefits to be derived from such procedure, not only by the school interests but by the taxpayers and community as well.

[3] With these observations, we are led to the conclusion that, if section 5.1100 were otherwise constitutional, there would probably be no objection to limiting the

right to invoke its provisions to districts employing a certain number of teachers, but we can see no valid reason for further restricting operation of the act to two or more school districts whose governing boards have the same personnel. This classification seems not only arbitrary and illogical but liable to prove disadvantageous in operation as well.

The elementary and secondary school districts do not necessarily embrace a common geographic area, which fact, under operation of the statute, would result in the casting of unequal burdens upon taxpayers and unequal benefits upon teachers in the same territory. Indeed, in the present instance the petitioning districts under the control of one board are not coterminous. The area of the high school district exceeds that of the elementary district. It is not beyond possibility that in future the former may embrace territory of other elementary districts, employing the requisite number of teachers, who would be unable to share in any common retirement plan. The elementary and secondary districts are distinct organizations, and in no case are two or more elementary districts or two or more secondary districts governed by the same board or by boards having the same personnel.

Furthermore, any change in the personnel of one of the boards would obliterate the element of similarity which brought the statute into operation, while leaving operative the retirement system thereby established. Likewise in practical operation there would be a distinct discrimination against school districts which were coterminous and yet were governed by boards not having the same personnel.

We are cited to no reason why two or more districts employing 500 or more teachers cannot confederate to create a retirement system, even though governed by boards having different personnel. In our view, the attempted classification is decidedly arbitrary.

The alternative writ is discharged and the petition denied.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.

PUREFOY v. PACIFIC AUTOMOBILE INDEMNITY EXCHANGE.*

L. A. 14041.

Supreme Court of California.

June 5, 1935.

Rehearing Granted July 5, 1935.

Insurance ⇨ 514½

Insured's failure to notify insurer of accident until service of summons against him held not to preclude injured person from suing insurer on automobile liability because of breach of co-operation clause, where seven months before trial insurer informed injured person that it was not liable under policy and was not interested in action against insured and subsequently insured delivered to insurer complaint and summons, since insurer failed to show that it was prejudiced by insured's action (St. 1919, p. 776).

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Suit by J. W. Purefoy against the Pacific Automobile Indemnity Exchange. From a judgment for defendant, petitioner appeals.

Reversed.

For prior opinion, see 36 P.(2d) 1076.

Bordwell, Mathews & Wadsworth, John H. Mathews and W. H. Wadsworth, all of Los Angeles, for appellant.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

WASTE, Chief Justice.

On December 15, 1929, W. S. Austin insured his automobile with respondent company. On the following day, December 16, while Austin's young son was driving the car with his father's consent, an accident occurred in which the appellant, J. W. Purefoy, was injured. Purefoy filed suit for damages against the Austins on March 15, 1930. The respondent company was notified of this action by appellant's attorneys on March 31, 1930, September 20, 1930, and April 10, 1931. Austin, however, did not personally notify the insurer of the accident until March 18, 1931, a year and three months after it occurred, when he was served with summons and complaint in the action against him for damages.

These he transmitted to the company's agent with the request, "Please advise procedure."

Respondent company disclaimed liability for lack of timely notice, asserting Austin had failed to comply with the provisions of the co-operation clause in the insurance policy, and refused to participate in the action for damages which resulted in a judgment for Purefoy, which went unpaid. Purefoy brought suit against the insurer, and the trial court held against him. From this judgment, he appeals.

Respondent relies upon a strict and literal interpretation of the co-operation clause of its insurance contract with Austin, requiring that assured give "immediate written notice of any accident, claim, loss or suit hereunder * * *," and other requirements customary in such insurance contracts, which conclude with the declaration that "immediately upon a failure or refusal to perform any one or more of said conditions this policy and the liability of the Exchange, if any, thereunder shall automatically terminate." Were such an interpretation given effect in all cases, it would open an avenue of temptation to insurers, through collusive action with judgment proof clients, to evade payment of just claims.

A contract of insurance against liability is one for the benefit of unknown third parties who become known and identified upon being injured by the insured. It would be a strange and useless proceeding on the part of the Legislature to give to the injured party the right to sue the insurer (Stats. 1919, p. 776), if such action could be defeated by the insurance company and the insured without the knowledge or consent of, or any act on the part of, the injured person. *Malmgren v. Southwestern Automobile Ins. Co.*, 201 Cal. 29, 33, 255 P. 512; *Bachman v. Independence Indemnity Co.*, 112 Cal. App. 465, 483, 297 P. 110, 298 P. 57. The failure of Austin, the insured, to fully co-operate with the insurance company did not, therefore, deprive plaintiff of his right of action in this case.

It cannot be said that the insurance company here was substantially prejudiced by the indifference of the insured to his engagement to promptly notify defendant in case of an accident. Seven months before the trial of the injury case, the defendant informed plaintiff that it was not

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 155.

liable to plaintiff under the policy of insurance, and "was not interested in the action" against the Austins for the reason that the Austins had not furnished it with any information or assistance concerning the accident. Subsequently, the Austins delivered to defendant the complaint and summons which had been served on them. No facts are found from which it may be reasonably found that the defendant did not have ample opportunity to defend the injury action. It is not found that the defendant required anything of the insured that the insured did not do. Defendant chose to rely absolutely on the co-operation clause. The facts here differentiate this case from the case of *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P.(2d) 999, 85 A. L. R. 13. In that case, the court held that it was error for the trial court, in an action similar to this, to strike from the answer of the insurance company its defense that the insured had failed to co-operate. Here the defense was pleaded, but defendant has failed to show it was prejudiced by the insured's action.

The judgment is reversed.

We concur: SHENK, J.; THOMPSON, J.; CURTIS, J.; SEAWELL, J.



3 Cal.2d 725

QUINN et al. v. RECREATION PARK

ASS'N et al.

S. F. 15297.

Supreme Court of California.

June 6, 1935.

Rehearing Denied July 5, 1935.

1. Theaters and shows ☞6

That a baseball player batted a foul ball which struck spectator in grand stand at baseball park is not proof that the player was negligent.

2. Joint adventures ☞1

To establish a "joint adventure," there must be proof, as in case of a partnership, of a community interest and a sharing of profits.

[Ed. Note.—For other definitions of "Joint Adventure," see Words & Phrases.]

3. Theaters and shows ☞6

Professional ball player of visiting club could not be held liable to injured spectator as joint adventurer with operators of local park in absence of proof of community interest or sharing of profits, or participation in management.

4. Appeal and error ☞758(1)

Where appellant's brief makes no complaint of directed verdict as regards certain defendant, and does attempt to point out any legal ground on which he may be held liable, judgment will be affirmed as to such defendant.

5. Theaters and shows ☞6

Operator of baseball park is required to exercise only ordinary care to prevent patrons from being struck by batted or thrown balls.

6. Theaters and shows ☞6

Ordinary care to protect patrons of baseball park from being struck by batted or thrown balls does not require park management to screen all seats, or to provide screened seats for all who may apply for them, but only to provide screened seats for as many patrons as may reasonably be expected to call for them on ordinary occasions.

7. Theaters and shows ☞6

Spectator at baseball park who chooses an unscreened seat or takes one because screened seat is not available assumes risk of being struck by thrown or batted balls.

8. Evidence ☞5(2)

It is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness that they are liable to be thrown or batted outside the lines of the diamond.

9. Theaters and shows ☞6

Athletic girl of fourteen, who took unscreened seat along first base line in professional baseball park with full knowledge of danger attached to so doing, assumed risk of injury from thrown or batted balls and could not recover for injury resulting from batted ball, although she desired a screened seat in such section in which none was available and took unscreened seat temporarily at suggestion of usher.

10. Appeal and error ☞973

In absence of clear abuse of discretion, reviewing courts will not interfere with rulings of trial courts in submitting or refusing to submit to juries whether contributory negligence of children of the age of fourteen

years and younger was such as to prevent their recovering for injuries sustained.

In Bank.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Action by Joan Quinn, a minor, by Aloysius W. Quinn, her guardian ad litem, and others against the Recreation Park Association and others. From a judgment for named defendant and Gussie Suhr, a defendant, on directed verdict, plaintiffs appeal. On respondents' separate motions to dismiss appeal or affirm the judgment.

Judgment affirmed as to each respondent.

Prior opinions, 35 P.(2d) 602, 605.

George D. Collins, Jr., of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent San Francisco Baseball Club, Inc.

I. I. Brown, Robert P. Cahen, and Vogensang & Brown, all of San Francisco, for respondent Pittsburgh Baseball Club and Gussie Suhr.

PER CURIAM.

A hearing was granted in this case for the purpose of giving further consideration to the question of assumption of risk by the plaintiff. Upon a reading of the record we are satisfied with the opinion of the District Court of Appeal, written by Mr. Justice Knight, and we hereby adopt it as the opinion of this court.

The appellant, Joan Quinn, while occupying a seat in an open section of the grand stand in Recreation Park, San Francisco, witnessing a game of professional baseball which was being played between the San Francisco and Pittsburgh ball clubs, was struck and injured by a foul ball batted by a player named Suhr, a member of the Pittsburgh club. At the time the accident happened, she was fourteen years of age, and, through her guardian ad litem, she joined her parents in bringing this action for damages against the management of the park, the owners of both ball clubs, and the player who batted the ball. The action was brought to trial against two of the defendants only, namely, the San Francisco ball club and the player Suhr; and at the conclusion of plaintiff's case the trial court granted

a motion made in behalf of said defendants for a directed verdict. From the judgment entered on said verdict, this appeal was taken.

Appellants contend that the proximate cause of the accident consisted in selling her an unscreened seat in the section of the grand stand near first base and requiring her to occupy said seat temporarily, after she had requested, at the time she purchased her ticket, a screened seat in that section.

[1-4] Following the filing of appellants' opening brief, the respondent Suhr, appearing separately moved for a dismissal of the appeal or an affirmance of the judgment as to him upon the ground that nowhere in said brief was any complaint made as to the trial court's ruling directing a verdict in his behalf, nor was any attempt made therein to point out any legal ground upon which they sought to hold him liable, jointly or severally, for the accident. In response to the motion, appellants, for the first time, advanced the theories that the act of a baseball player in batting a foul ball which falls among the spectators in the grand stand is itself negligence; and that in any event in participating in the game as a player, respondent was engaged in a joint adventure with the club management which rendered him jointly and severally liable for any negligent act on its part. There is no merit in either theory. No authority has been cited in support thereof, and the fallacy of the first is self-evident. As to the second, it is well settled that in order to establish the existence of a joint adventure there must be proof, as in case of a partnership, of a community interest, and a sharing of profits (14 Cal. Jur. 761; Dempsey-Kearns Theatrical, etc., Enterprises v. Pantages, 91 Cal. App. 677, 267 P. 550); and here there was no proof whatever tending to show, nor do appellants claim, that there was any such community interest or sharing of profits between the players and the club management, nor that the players had anything to do with the management of the park, selling the tickets, seating the spectators, or promoting the exhibition itself. Therefore respondent's motion to affirm the judgment as to him should be granted.

The respondent baseball club at the outset contends too that the appeal as to it should be dismissed or the judgment affirmed upon the ground that appellants'

opening brief failed to conform to the requirements of the statute and the rules of court relating to setting forth certain portions of the pleadings, the evidence, and a brief statement of the legal questions presented by the appeal. Inasmuch, however, as appellants in their closing brief have attempted to supply, to some extent at least, the omissions complained of, we have examined into the merits of the appeal; but, after having done so, are satisfied that the action of the trial court in directing the verdict should be sustained.

[5-8] With respect to the law governing cases of this kind, it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source. All that is required is the exercise of ordinary care to protect patrons against such injuries (*Edling v. Kansas City Baseball, etc., Co.*, 181 Mo. App. 327, 168 S. W. 908), and, in doing so, the management is not obliged to screen all seats, because, as pointed out by the decisions, many patrons prefer to sit where their view is not obscured by a screen. Moreover, the management is not required to provide screened seats for all who may apply for them. The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion (*Wells v. Minneapolis Baseball, etc., Ass'n*, 122 Minn. 327, 142 N. W. 706, 46 L. R. A. (N. S.) 606, Ann. Cas. 1914D, 922; *Brisson v. Minneapolis Baseball, etc., Ass'n*, 185 Minn. 507, 240 N. W. 903); and if, as in the cases of *Wells v. Minneapolis Baseball, etc., Ass'n*, supra, and *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 177 P. 776, 181 P. 679, a spectator chooses to occupy an unscreened seat, or, as in the *Brisson Case*, supra, is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck by thrown or batted balls; and, if injured thereby, is precluded from recovering damages therefor. As aptly said in *Cincinnati Base Ball Club Co. v. Eno*, 112 Ohio St. 175, 147 N. E. 86, it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they

are liable to be thrown or batted outside the lines of the diamond, and spectators occupying positions which may be reached by such balls assume the risk of injury therefrom.

[9] In the present case the evidence shows that on the day in question the said Joan Quinn went to the game alone. She was a high school student, strong, mentally alert, weighing about 125 pounds, and active in several kinds of athletics, including baseball. She had been interested in professional baseball for about two years, during which time she had attended professional games at this same park about twice a week during baseball season, and she was admittedly thoroughly familiar with the rules of the game, the manner in which it was played, the frequency with which foul balls were batted into the grand stand, and the danger to spectators of being struck thereby. The grand stand in Recreation Park contained an unusually large number of screened seats, some in the section along the first base line and others in the section behind the home plate, and, according to her testimony, she asked the ticket seller for a screened seat near first base and not behind the home plate. Upon reaching the grand stand, however, the usher escorted her to an unscreened set near first base, all of the screened seats in that section being occupied. She protested, but was told by the usher, so she testified, that she could see for herself there were no more unoccupied screened seats near first base; and he further told her, so she said, that inasmuch as the game had already started she would have to sit down in the seat called for by her ticket until he could see what could be done about it, that she was obstructing the view of those behind her; whereupon she sat down, believing the usher would be able later to provide her with a screened seat in that section. The evidence also shows that at the time she took the seat assigned to her there were a number of unoccupied screened seats in the section behind the home plate, but, as stated, she expressed a desire to witness the game from along the first base line, and consequently she continued to watch the game from the seat to which she had been assigned until she was struck by the ball, which she thought was during the fourth inning of the game, although she was not certain. And she frankly admitted knowing at the

time she took the unscreened seat she would be in danger of being struck by a batted ball.

Under the law as declared in the cases above cited, therefore, it would seem clear that in accepting the unscreened seat, even temporarily, with full knowledge of the danger attached to so doing, she assumed the risk of injury, which precluded recovery of damages.

Appellants argue that the usher in effect compelled her to sit and remain in the unscreened seat assigned to her, and that consequently the case does not fall within the operation of the legal rules declared by the cases above cited. But the evidence will not bear such construction, for it is plain to be seen that she could have taken a screened seat elsewhere in the grand stand where she would not have been subject to danger, or she could have refused to accept the seat to which she was assigned and demanded the return of her admission money. But she did neither. According to her own testimony she wanted to witness the game from the section of the grand stand near first base.

[10] Appellants make the further contention that the element of contributory negligence may not be considered on the appeal because it was not properly pleaded in the answer; and that in any event it was a question of fact to be determined by the jury. In the absence of any demurrer to the answer, however, the allegations thereof were legally sufficient to raise the issue [*Griswold v. Pacific Electric R. Co.*, 45 Cal. App. 81, 187 P. 65; *Salvo v. Market Street R. Co.*, 116 Cal. App. 339, 2 P.(2d) 585]; and, as to the latter point, it is held generally that, in the absence of a clear showing of abuse of discretion, reviewing courts will not interfere with the rulings of trial courts in submitting or refusing to submit to juries the question of whether the contributory negligence of children of the age of fourteen years and under was such as to prevent their recovering for injuries sustained by them (*Mayne v. San Diego Electric R. Co.*, 179 Cal. 173, 175 P. 690; *Wallace v. Great Western Power Co.*, 204 Cal. 15, 266 P. 281); and there are a number of cases involving injuries to minors about the age of the girl in question here wherein it was held as a matter of law that they were guilty of contributory negligence, among them being Wal-

lace v. Great Western Power Co., supra, *Bolar v. Maxwell Hardware Co.*, 205 Cal. 396, 271 P. 97, 60 A. L. R. 429, *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39, and *Whalen v. Streshley*, 205 Cal. 78, 269 P. 928, 60 A. L. R. 445. In view of the admitted facts of this case, showing full knowledge on the part of the injured girl of the risks she was assuming in occupying an unscreened seat in the section of the grand stand along the first base line, there can be no ground for holding that the trial court in the present case abused its discretion in refusing to submit the issue of contributory negligence to the jury.

The respondent Suhr has made a motion to affirm the judgment. For the reasons above stated, it is unnecessary to consider the motion separately.

The judgment is affirmed.



3 Cal.2d 733

FEATHER RIVER LAND & MINING CO. v.
PARADISE IRR. DIST.

Sac. 4923.

Supreme Court of California.

June 11, 1935.

Dismissal and nonsuit ☞60(4)

Dismissal of action to quiet title for lack of diligence in prosecuting cause held not abuse of discretion, where negotiations for settlement were mostly before commencement of action, no steps to compromise were taken within about nine months before service of summons, and plaintiff offered no other excuse for delay, and made no reply to statement of defendant's counsel that plaintiff's interest in property could be fully protected in action subsequently filed by defendant against plaintiff.

In Bank.

Appeal from Superior Court, Butte County; Warren Steel, Judge.

Action by the Feather River Land & Mining Company against the Paradise Irrigation District. From a judgment of dismissal, plaintiff appeals.

Affirmed.

D. Joseph Coyne, of Los Angeles, and Leslie K. Floyd, of Modesto, for appellant.

H. S. Clewett, of Los Angeles, for respondent.

PER CURIAM.

Appeal from a judgment of dismissal of the action on motion of the defendant based on alleged lack of diligence in the prosecution of the cause.

The plaintiff was the owner of lands including mineral rights therein and certain improvements thereon, located within the defendant irrigation district.

From 1917 to 1927, inclusive, the plaintiff paid irrigation district assessments levied against said lands. The lands were sold to the district for delinquent assessments of 1928.

On April 11, 1933, the plaintiff filed the complaint seeking to quiet its title against the district and for other incidental relief, claiming that the assessments were confiscatory and otherwise invalid. Summons was issued upon the filing of the complaint, but was not served until May 17, 1934, notwithstanding the fact that the district maintained its offices in the county of Butte and its officers were at all times known to the plaintiff's attorney and available for service of summons.

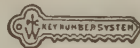
On May 1, 1934, the district commenced an action against the plaintiff involving the property, and process was served on the defendant therein (plaintiff herein), prior to May 17, 1934. The defendant's motion to dismiss was granted on the showing made by affidavit that the plaintiff had purposely delayed, and without reason, the prosecution of the action, and was therefore guilty of lack of diligence in the premises.

The parties agree that, in addition to the statutory grounds for dismissal of actions for lack of prosecution, the court has inherent power, limited by sound discretion, to dismiss an action for want of reasonable diligence in the prosecution thereof. See *Witter v. Phelps*, 163 Cal. 655, 126 P. 593. The only question presented is whether the trial court, as contended by the plaintiff, was guilty of such an abuse of discretion as would require this court to reverse the judgment of dismissal. The defendant's showing was sufficient, prima facie, to justify the court's order. The plaintiff's showing was to the

effect that there had been continual and protracted negotiations for a settlement of the controversy, and in addition that no prejudice to the defendant by reason of the delay had been shown. It appeared that negotiations for a settlement had been carried on between the parties commencing November 4, 1932, but most of these negotiations had been had prior to the commencement of the present action. No steps appear to have been taken looking to a compromise after August 15, 1933, or about nine months before the service of summons which was in the following May. The plaintiff offered no other excuse for the delay, and there is no reply to the statement of counsel for the defendant that whatever interest the plaintiff may have in the property can be fully protected in the action subsequently filed.

On the record presented, it cannot be said that there was an abuse of discretion on the part of the trial court in dismissing the action.

Judgment affirmed.



In re FINKLER'S ESTATE.
S. F. 14681.

Supreme Court of California,
Jan. 25, 1934.

In Bank.

See, also (Cal. App.) 21 P.(2d) 681;
(Cal. Sup.) 46 P.(2d) 149.

PER CURIAM.

Good cause appearing therefor, it is ordered that the submission heretofore entered herein be, and the same is hereby, vacated and set aside.

It is further ordered that contestants be granted 20 days, respondent 20 days, and contestants 10 days to file briefs on the following questions:

(1) In passing upon the scope and validity of finding No. 5 of the court below, is it necessary to determine whether there is a difference in meaning between the document as ordered to probate and the document as amended, if effect be given

to all cancellations, alterations, amendments, interlineations, and changes appearing on the face thereof?

(2) If answered in the affirmative, does or does not the document, as altered and amended, purport to dispose of decedent's whole estate to the same devisees and legatees, in the same distributive proportions shown by the document as it read on April 21, 1930?

Cause then to be submitted without further argument.



3 Cal.2d 584

In re FINKLER'S ESTATE.

FINKLER v. PURCELL et al.

WAITE et al. v. SAME.

S. F. 14681.

Supreme Court of California.

May 3, 1935.

Rehearing Denied June 1, 1935.

1. Judgment ⇨199(1)

Right of trial court to render judgment notwithstanding verdict is same as right to grant nonsuit or direct verdict (Code Civ. Proc. § 629).

Nonsuit may be granted, or directed verdict ordered against will contestants, when, disregarding conflicting evidence, and giving to the contestants' evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn therefrom, the result is a determination that there was no evidence of sufficient substantiality to support a verdict in favor of contestants if such a verdict were returned.

2. Trial ⇨139(1)

Trial court may direct verdict for defendant where there is no substantial evidence tending to prove controverted facts necessary to establish plaintiff's case.

3. Trial ⇨143

To deprive trial court of right to direct verdict on ground evidence is conflicting, conflict must be substantial one.

4. Wills ⇨50

Testator has sufficient testamentary capacity if he has sufficient mental capacity to

understand nature of act, recall property, and remember relation to persons who have claims upon his bounty.

5. Wills ⇨31

Generally, will, attacked on ground that testator lacked sufficient testamentary capacity, will be sustained where it appears that testator was capable of directing business affairs.

6. Wills ⇨55(3)

Evidence held to establish that testator, notwithstanding delusion and eccentricity, possessed sufficient testamentary capacity.

7. Wills ⇨82

In determining validity of will, nieces and nephews, descendants of deceased brothers and sisters of testator's predeceased wife, are not natural objects of his bounty.

8. Wills ⇨82

Where testator and his half-sister were estranged, omission to remember half-sister in will did not make will an unnatural one.

9. Wills ⇨166(1)

To establish undue influence, proofs must show pressure which overpowered mind of testator and bore down volition at time he executed will.

10. Wills ⇨166(7)

Mere proof of opportunity to influence testator's mind, even when coupled with interest or motive, will not sustain finding of undue influence, in absence of testimony showing pressure operating directly on testamentary act.

11. Wills ⇨163(1)

Contestant, to have will set aside on ground of undue influence, must establish circumstances inconsistent with voluntary action by testator.

12. Wills ⇨166(1)

Evidence held insufficient to establish undue influence which destroyed testator's free agency at time he executed will.

13. Wills ⇨174

Cancellations and interlineations made by testator in holographic will held effective, though not accompanied by redating, re-execution, and republication of instrument, where changes were made in testator's handwriting and document as changed remained in testator's possession until death (Probate Code, § 74, subd. 2).

14. Wills ⇨384

Error in failing to probate holographic will in language thereof after interlineations were made held harmless, where provisions were identical as to legatees and both dis-

posed of "all my property," though will as changed recited "codicils to follow" (Probate Code, § 72).

LANGDON, J., dissenting.

In Bank.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Proceedings in the matter of the estate of Henry C. Finkler, deceased, wherein Christina A. Finkler, and Sumner J. Waite and others, filed separate will contests, opposed by M. J. Purcell and another. From a judgment admitting the will to probate, contestants appeal.

Judgment affirmed.

Prior opinion, 21 P.(2d) 681.

See, also, 46 P.(2d) 148.

Henry Eickhoff, Henry Eickhoff, Jr., and George W. Wilson, all of San Francisco, and J. E. McCurdy, of San Mateo, for appellant Christina A. Finkler.

F. J. Kilmartin and Knight, Boland & Riordan, all of San Francisco, for appellants Sumner J. Waite, Edith F. Stewart, Aurelia Hanlan, Emmett Brophy, and Bernice Macaire.

Ross & Ross, of Redwood City, for respondents.

PRESTON, Justice.

This record presents two main questions for consideration: First, that of the validity of the testamentary attempt of Henry C. Finkler, deceased, involving a claim of insanity and undue influence; and, second, that of proper construction of the instrument in case its probate is declared valid.

The decedent was for some fifty-two years a loyal attaché of this court, serving it in various capacities, and particularly as its senior secretary. This latter work was performed until the day next prior to his tragic death. The record shows that the work performed by him required care, accuracy, diligence, judgment, and discretion; that he was in daily contact with the justices of the court and also in almost constant communication with the Chief Justice; that his ability to function and to carry on his duties was under the daily observation of his cosecretary on the court; that the business of the court also brought him in daily communication with the publisher of the legal

paper known as The Recorder, which published the opinions of the court; that he was too, of necessity, in daily communication with the clerk of this court, who was made a beneficiary under his last will and testament. The testimony adduced also shows him to have been a well-known character in court circles. In fact, in 1928, at the instance of prominent members of the bar, his faithful and efficient public service was recognized by an appropriate public ceremony in the courtroom of this court in the state building, which ceremony he attended and, to the laudatory remarks made of him, gave appropriate public response. Witnesses in all the above-mentioned relationships gave convincing testimony of his sanity up to a period of within two weeks next prior to his death.

Yet, notwithstanding these facts, several lay witnesses testified that in their opinion the testator was of unsound mind, and they all stated that in their opinion this condition had obtained for many years, some of them going back as far as fourteen years next prior to his death. No witness, however, attempted to say that he was so low in mentality that he could not transact business of every kind. In fact, in addition to the work of the court, he was in the summer of 1930, next following the execution of his will, an efficient and active fire commissioner of the Emerald Lake fire district. The evidence respecting the alleged insanity relates almost exclusively to certain delusions possessed by the testator, but no one of said delusions was shown to be such as would or could affect the testamentary disposition of his property.

The judgment of the court below upheld the document in question as the last will and testament of said decedent. Contestants then appealed to this court. The cause was transferred to the Fourth Appellate District for decision and, again on petition of contestants, was later transferred to this court. So much of the opinion of the District Court of Appeal as disposes of the question of insanity and undue influence, we hereby adopt as part of this opinion, same being as follows, to wit:

The decedent, Henry C. Finkler, died November 18, 1930, by suicide. A document, in form a holographic will, bearing date of April 21, 1930, was in due time presented to the probate court as the last

will and testament of said deceased. By said will decedent named as sole beneficiaries thereunder, M. J. Purcell, the husband of a niece of decedent's predeceased spouse, and B. Grant Taylor. Mr. Finkler left as his only heirs at law, Christina Finkler, a half-sister, and Sumner J. Waite, Emmett Brophy, Edith F. Stewart, Aurelia Hanlan, and Bernice Macaire, nephews and nieces of Aileen Finkler, predeceased wife of Henry C. Finkler, contestants herein, and Aileen Purcell, a niece of Aileen Finkler, who is the wife of respondent M. J. Purcell.

A contest was filed by Christina A. Finkler, a half-sister of the deceased, who based her action upon the following grounds, to wit: (1) That at the time the deceased executed the will in question he was not mentally competent to make a will. (2) That the said will was procured to be executed under the undue influence of M. J. Purcell. (3) Incompleteness of the will.

Subsequently a like contest was filed by Sumner J. Waite, Emmett Brophy, Edith F. Stewart, Aurelia Hanlan, and Bernice Macaire upon similar grounds, except that they did not allege undue influence. The contest went to trial before the court with a jury, and at the conclusion of contestants' case a motion for nonsuit was made upon the grounds of insufficiency of the evidence, which motion was denied by the court. At the close of the trial proponents moved for a directed verdict on the ground of insufficiency of the evidence. The court denied the motion. The special issues of incompetency and undue influence were thereupon submitted to the jury for decision, the other issues being reserved for the court. The jury returned a verdict finding: (1) That at the time of the execution of the purported will dated April 21, 1930, the decedent Henry C. Finkler was of unsound mind, and (2) that the said purported will dated April 21, 1930, was procured through the undue influence of M. J. Purcell. Thereupon the proponents moved for a judgment notwithstanding the verdict, which was granted. In addition the court ruled against the contestants on the remainder of the issues and the will was admitted to probate. From this judgment the contestants have appealed. Separate briefs have been filed by the two groups of contestants.

Appellant Christina Finkler attacks the judgment admitting the will to probate on the grounds: (1) The court erred in granting proponents a judgment notwithstanding the jury's verdict that decedent was of unsound mind at the time of the execution of the will, and that it was procured through undue influence; and (2) assuming the document to be a will, all the alterations, interlineations, cancellations, and additions thereto are valid and must be given effect. Appellant Sumner J. Waite and his cousins in their brief attack the judgment on the second ground alone, and also allege that there was a revocation of the devise of the realty. By section 629 of the Code of Civil Procedure, enacted in 1923, it is provided that "when a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
* * *

[1] Both contestants and respondents concede the law to be that the right of the court to render a judgment notwithstanding the verdict is the same as the right of the court to grant a nonsuit or direct a verdict, and that a nonsuit may be granted or a directed verdict ordered when, disregarding conflicting evidence, and giving to the contestants' evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of contestants if such a verdict were returned.

[2,3] In Estate of Sharon, 179 Cal. 447, at page 459, 177 P. 283, 288, the court says: "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

There are numerous decisions to this effect. We cite the following cases: *Estate of Baldwin*, 162 Cal. 471, 473, 123 P. 267; *Sill v. Ceschi*, 167 Cal. 698, 704, 706, 140 P. 949; *Estate of Caspar*, 172 Cal. 147, 155 P. 631; *Jacobson v. Northwestern, etc., Co.*, 175 Cal. 468, 473, 166 P. 3; *Perera v. Panama P. I. E. Co.*, 179 Cal. 63, 175 P. 454.

In *Estate of Hamburger*, 126 Cal. App. 455, 14 P.(2d) 802, 805, one of the more recent cases upon the subject, the court says: "Without here attempting to draw a fine technical definition of a nonsuit and without trying to harmonize the several leading cases upon the subject (and we confess that there are statements in the opinion in *Estate of Ivey*, 94 Cal. App. 576, 271 P. 559, with which we do not entirely agree), we think the following expresses the problem before us, in so far as the question of mental incapacity is concerned: Is there any substantial testimony that decedent was so mentally incapacitated on the 18th day of August, 1930, that he could not have understood the contents of the document which he signed on that day as his last will and testament? * * *

The first question then that presents itself to this court for consideration and determination is: Is there any substantial testimony that decedent, Henry C. Finkler, was so mentally incapacitated on the 21st day of April, 1930, that he did not have testamentary capacity?

The estate involved is of the value of approximately \$54,659, and consists of 182 acres of land near Redwood City in San Mateo county, valued at \$40,000; real estate in San Francisco county valued at \$1,000; personal property and jewelry valued at \$500; and cash in the bank valued at \$13,159.

It appears from the record in this case that Mr. Finkler had been secretary of the Supreme Court of the State of California for more than 50 years prior to his death; that he was acting as such secretary when he drew the will in question here and up to the very night before he committed suicide; that he lived on a ranch near Redwood City; that during the summer of 1930, at the time of making the will, and subsequent thereto, he was a fire commissioner of the Emerald Lake Fire District. The deceased, at the time of his death, was 72 years old. His mother was born in Mexico and at the time of her

marriage had two daughters by a former marriage, Christina and Clara, both of whom took the Finkler name; the decedent's father committed suicide in the seventies. During her lifetime the decedent's mother had twice been committed to an asylum by reason of insanity. Likewise the deceased's half-sister Clara had been adjudged insane and committed to an institution.

From this pathological background we will now proceed to examine the testimony adduced at the trial necessary to the consideration of the case.

Various witnesses were called by appellant and testified. To set out at length the testimony of each individual witness would add nothing to the legal literature of this state. Hence, we shall confine ourselves to a general summary of the facts as they appear from the testimony of the various witnesses as set forth in appellant's brief.

The evidence shows that decedent was building an airplane in the attic of his home at Redwood City; he spoke of a tunnel which ran from the hill on his property to Lake Merced; he had several loaded guns around his house; he failed to recognize and speak to acquaintances at various times; he considered his Redwood City property very valuable; he watched the delinquent tax sales; he thought he could obtain bargains at such sales; he was cruel to dumb animals; he claimed supernatural powers; and he thought there was a valuable water supply on his San Mateo county property.

[4] While some of the testimony introduced by appellant tends to show a mental weakness and indicates beyond question that the deceased had delusions at various times during the latter years of his life, and also that in many ways he was peculiar and that during many years he was eccentric in some respects, yet all of such testimony should be read in the light of the opinion in *Estate of Bemmerly*, 110 Cal. App. 550, 560, 294 P. 33, 37: "The law is well settled in this state that a testator is of sound and disposing mind and memory, if, at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and

whose interests are affected by the provisions of the instrument.'"

In *Estate of Casarotti*, 184 Cal. 73, 80, 192 P. 1085, 1087, the court says: "It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will. *Estate of Motz*, 136 Cal. 558, 69 P. 294; *Estate of Purcell*, 164 Cal. 300, 128 P. 932; *Estate of Huston*, 163 Cal. 166, 124 P. 852; *Estate of Weber*, 15 Cal. App. 224, 114 P. 597."

[5] It is quite significant that none of the contestants' witnesses testified in any way whatsoever as to Mr. Finkler being unable to understand business transactions or being unable to understand or recollect the nature of his property or his relation to his half-sister and the nieces and nephews of his deceased wife. It is further significant that no witness for contestants gave any reason for his opinion as to the sanity of the testator sufficient to sustain that opinion. A factor of great importance involving will contests is to be found in the proof as to the decedent's business ability. As a matter of fact the propounded instrument is usually sustained where it appears that the decedent was capable of directing business affairs. 26 Cal. Jur. 674; *Huyck v. Rennie*, 151 Cal. 411, 90 P. 929.

In *Estate of Redfield*, 116 Cal. 637, at page 655, 48 P. 794, 799, the court approves a quotation from the prerogative court of New Jersey, as follows: "The abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility. It * * * is to be ascertained by the court by the application of certain rules of law, in the exercise of a sound

discretion regulated by these rules. The opinion of a witness must be brought to the test of facts, that the court may judge what estimate the opinion is entitled to. It is proper and legal to ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question. The court will judge of * * * the proper weight to be given to his opinion from the facts and circumstances upon which he founds his opinion.' *Stackhouse v. Horton*, 15 N. J. Eq. 202, 208."

In *Estate of Chevallier*, 159 Cal. 161, 168, 169, 113 P. 130, 133, the court says: "In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld. Thus the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the ab-

normality of mind has a direct influence upon the testamentary act."

In *Estate of Perkins*, 195 Cal. 699, 703, 235 P. 45, 46, the court says:

"It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix *at the time of the execution of the will* is the question to be determined. [Citing cases.] Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will. [Citing cases.] Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence. *Estate of Dolbeer*, supra [149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795].

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix' estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. *Estate of Chevallier*, 159 Cal. 161, 113 P. 130; *Estate of Wasserman*, 170 Cal. 101, 148 P. 931.

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delu-

sions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act. *Estate of Chevallier*, supra; *Estate of Collins*, 174 Cal. 663, 670, 164 P. 1110; *Estate of Redfield*, 116 Cal. 637, 48 P. 794; *Estate of Casarotti* [184 Cal. 73, 192 P. 1085], supra."

[6] In addition to the testimony that appellants have directed to our attention, we have searched the entire record and have failed to find any substantial evidence that indicates that any delusions existed in the mind of the decedent the day he executed his will or that any delusions affected in any manner his testamentary capacity. Such being the state of the evidence and applying the principles of law above set forth to the instant case, the conclusion is inescapable that the contestants failed to sustain the burden of establishing the fact that at the time of the execution of the will, to wit, April 21, 1930, the testator was so mentally incapacitated that he did not have testamentary capacity. From the evidence it appears to us that the testator was affected with some of the idiosyncrasies, peculiarities, and eccentricities of life but that they were induced by his mode of living and by advanced age, and the evidence taken as a whole merely proves that at the time of his death his mental and physical powers were waning.

We conclude that there is an utter failure of any evidence showing that either the delusions or eccentricities described showed that the decedent did not possess testamentary capacity at the time he executed his will.

[7] Appellant contends that the will is unjust, because it omitted from its provisions the natural objects of his bounty, the contestants herein. The contestants, referred to as "his nieces and nephews," are admittedly unrelated to the testator, but are descendants of deceased brothers and sisters of Aileen Finkler, the testator's predeceased spouse. They are heirs at law of the testator, but are not the natural objects of his bounty.

The remaining contestant, Christina Finkler, testified that: "We have been estranged for many years. Just why I do not know." That she never had at any time visited his home in Redwood City un-

til after his death; that she came down to see his remains.

Mrs. Purcell testified regarding appellant Christina Finkler that "she had done nothing to assist in the care of her mother during her declining years." After his wife's death she had declined to join decedent or share his home or relieve his loneliness.

Nellie Lewis, a lifelong friend of Finkler's, testified that Mr. Finkler showed her his will a week or two after he had drawn it; that he told her he would not leave Mrs. Finkler's people anything; that he was very bitter toward Christina Finkler; and that he didn't want to remember her at all.

B. Grant Taylor testified that decedent showed him the will and said: "I have decided that the best thing I can do with my property is to leave it to you and Mike Purcell. You have four children and Mike has six and it will be very helpful to you." Mr. Taylor also testified as to Mr. Finkler again showing him the will while they were passengers on a boat to Sacramento to attend a session of the Supreme Court and of his preparing a rough form of will for Mr. Finkler and of inserting a provision therein for Christina Finkler.

"Q. Who suggested Christina's name?
A. I did.

"Q. You thought it would be a good idea to provide for her? A. I felt that being a sister it would be proper for him to provide for her."

[8] The evidence clearly shows that decedent and appellant Christina Finkler were estranged and had very little to do with one another. The estrangement appearing in evidence, the omission to remember her does not make the will an unnatural one. Estate of Kaufman, 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179; Estate of Lavinburg, 161 Cal. 536, 119 P. 915; Estate of Morcel, 162 Cal. 188, 121 P. 733.

As to the other contestants, the nieces and nephews of Mr. Finkler's deceased wife, they were in no sense legally or morally the natural objects of his bounty.

2. It seems to us also that the evidence is entirely lacking as to the alleged undue influence of M. J. Purcell. A summary of the testimony indicates that after decedent's wife died Mr. and Mrs. Purcell visited decedent at his home in San Mateo county; that their relations were friendly;

that decedent had openly expressed his admiration for Purcell and love for the Purcell children.

In regard to the execution of the will Mr. Purcell testified that he saw Mr. Finkler on the 21st day of April, 1930, at his place of business at 404 Sutter street, and Finkler said he had been to the dentist, and the dentist suggested extracting two teeth, which he thought was a pretty good idea since they were sore. Mr. Finkler said he had not made any will and that he decided he would make his will before he had that work done, as he realized if he died he would die intestate. He told Purcell that the dentist had injected novocaine. Purcell further testified that he had made no suggestion at the time with reference to making a will; that he gave decedent a piece of paper and pen to write with, but that decedent had requested the articles of him; that Mr. Finkler specifically asked Purcell for a piece of paper without any printing on it and said: "Before I have these teeth extracted I want to make my will." The witness testified he saw decedent writing, but was at no time present when decedent was actually writing the will. After the will was written, Purcell accompanied decedent to Dr. Bartlett's office to have his tooth extracted, after which they went to the State Building. Purcell then took Mr. Finkler to the Purcell home where he spent the night.

[9-11] This is the testimony, in substance, upon which appellants predicate the theory of undue influence.

In Estate of Hamburger, supra, the court says: "It seems to us that the evidence shows that the contestant entertained but a suspicion of undue influence, unfounded in fact so far as shown by the testimony produced. 'Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it. Estate of Holloway, 195 Cal. 711, 235 P. 1012; Estate of Anderson, 185 Cal. 700, 198 P. 407. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the

testamentary act and to such an extent as to affect the terms of the testament. *Estate of Fleming*, 199 Cal. 750, 251 P. 637; *Estate of Bryson*, 191 Cal. 521, 217 P. 525. It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator. *Estate of Morcel*, 162 Cal. 188, 121 P. 733. *Estate of Donovan*, 114 Cal. App. 228, 299 P. 816, 818. See, also, *Estate of Presho*, 196 Cal. 639, 238 P. 944, and *Estate of McDevitt*, 95 Cal. 17, 30 P. 101."

[12] The evidence in this case, when weighed by the standard just quoted, falls far short of showing any such undue influence as in effect destroyed the testator's free agency and overwhelmed his volition at the time of making the will. In fact, the evidence is entirely lacking as to the alleged undue influence of proponent M. J. Purcell.

[13] The final contention of appellants is that the wrong document was admitted to probate in that decedent, after executing the will of April 21, 1930, made thereon certain cancellations, changes, and interlineations, in his own handwriting, which altered the meaning of the instrument. Behind this contention is the claim that under the document as altered, the deceased died intestate as to his real property, which is the bulk of the estate. In this behalf the court found that on April 21, 1930, the testator executed a holographic will in words and figures as follows, to wit: "San Francisco, Cal April 21, 1930—All my property money or realty I will to Mike Purcell and B. Grant Taylor collectively—Any person legally proving relation they will give such person ten dollars—Both to act as executors without bonds—H. C. Finkler."

The court further found as follows: "That said Henry C. Finkler did subsequent to the execution of said will, and at a time subsequent to the 29th day of April, 1930, make certain alterations, interlineations, additions and changes in said will, but did not thereby revoke said will or any of the terms thereof, and that none of said alterations, interlineations, additions or changes were dated or signed by said testator, and were and are of no effect."

Allowing effect to the cancellations and interlineations, the document reads as follows: "San Francisco, Cal April 21, 1930—I will all my property, personal or mixed will to Mike Purcell and B. Grant Taylor collectively—Any person legally proving relationship to be given ten dollars—Codicils to follow—Both to act as executors without bonds. H. C. Finkler."

The court admitted to probate the document as originally executed, acting unquestionably upon the conviction that the cancellations and interlineations were of no effect, because not accompanied by a re-dating, re-execution, and republication of the instrument. In this assumption the court fell into error. As the changes were made in the handwriting of the testator, and the document as changed remained in his possession until his death, this raised the clear presumption that the changes were made *animo cancellandi*. The rule in this respect has been stated by Mr. Page in his work on Wills, vol. 1 (2d Ed.) § 500, p. 822, as follows:

"If witnesses are not necessary to the validity of a will, as under the ecclesiastical law, interlineations made by a testator after he has executed his will, are a part thereof; since by his act of making such interlineations, intending them to be a part of his testament, testator has re-executed his testament in such form as would have been sufficient for the original execution thereof.

"Interlineations in a holographic will after execution are a part thereof; and if they are not in testator's handwriting the will is rendered invalid thereby.

"Since holographic wills do not need witnesses, testator's act in erasing words and interlining others may amount to a revocation and re-execution, although such conduct would not have this effect if the will were an attested will.

"Here again, we have an apparent, but not a real exception to the general rule with reference to the effect of interlineations, since the holographic will needs no witnesses; and its execution in testator's handwriting, including the interlineations, is a sufficient compliance with the statute which regulates the original execution of the will; and hence it may be justified on the theory of a sufficient re-execution."

The doctrine is also supported by the following additional authorities, to wit:

The case of *Succession of Guiraud*, 164 La. 620, 114 So. 489, 490, where the testator, after making a bequest to his clerk in a paragraph of his will, later interlined it with the following language: "I revoke the donation to Lionel Larrieu my clerk." The court said: "Even if the clause was inserted after the will was signed, and on a day actually subsequent to its date, it was the act of the testator himself, and the date and the signature apply to all that precede them, and make the instrument in its entirety a valid olographic testament." The applicable section of the Civil Code of Louisiana had the same meaning as our own former section 1292, subdivision 2, now section 74, subdivision 2 of the Probate Code. *Estate of Fay*, 145 Cal. 82, 85, 78 P. 340, 104 Am. St. Rep. 17.

The case of *La Rue v. Lee*, 63 W. Va. 388, 60 S. E. 388, 390, 14 L. R. A. (N. S.) 968, 129 Am. St. Rep. 978, is instructive for, speaking of a will in somewhat the same condition as the one before us, the court said: "So we say that erasures in a holographic will, made by the hand of testator himself, is legal revocation of such portions as are so erased, since it is in the manner required for a will of that kind to be executed; and new portions written into such will by the same hand, to take the place of erasures, or new portions otherwise written therein by the same hand, being thereby executed in the manner which justifies the validity of a holographic will originally, so long as the signature of the testator remains in such manner as to make it manifest that it is intended as a signature, do not in any sense invalidate the will or affect its finality, since it is then a complete new holographic will, and needs no re-execution or republication before witnesses, because it did not originally demand execution and publication before them. To say that the whole must be re-written and again signed by testator is simply to say that which is neither reasonable nor practicable."

In fact this rule was necessarily indorsed and followed by this court in the case of *Estate of Wikman*, 148 Cal. 642, 84 P. 212, where the question before the court was the effect upon a holographic will of a deletion of the name of the executrix named therein. The court sustained this act as a revocation of that provision of the will, and gave final effect to the

instrument as changed. If such cancellations are to be sustained, then so must interlineations which have been made with testamentary intent.

But at this juncture we are met with a practical problem. If it be a fact that said documents when properly interpreted give the whole of decedent's estate to the same beneficiaries and in the same proportions, is the variance in verbiage so material that the judgment must be reversed and the litigation prolonged until the will may be interpreted in some other court proceeding? Appellants, insisting upon this course, cite the rule that ordinarily questions of interpretation do not arise upon proceedings for the probate of a will. *Estate of Murphy*, 104 Cal. 554, 38 P. 543; *Estate of Cook*, 173 Cal. 465, 160 P. 553; *Estate of Parsons*, 196 Cal. 294, 237 P. 744.

[14] Yet, in the first case cited by them, the court actually did interpret the two documents proposed for probate by holding that they were in all essential particulars harmonious, if not identical. The spirit of that decision seems applicable here, for in effect we have two instruments before us; the one as executed on April 21, 1930, and remaining in that form until some unknown date subsequent to April 29, 1930, and the other instrument as later altered and amended. If they are both testamentary in character and dispose of the whole estate to the same parties in the same aliquot parts, what difference does it make whether the one, the other, or both are admitted to probate? Section 72, Probate Code.

Lest some injury might result to appellants, this court, of its own volition, called for supplemental briefs on the interpretation of these documents. Upon consideration of the able briefs filed, we are unable to reach any other result than that the meaning of the two instruments is identical. The words "all my property money or realty" and the words "all my property, personal or mixed" seem clearly to dispose of the estate of the testator in its entirety. If the first phrase is all-inclusive, so must the second be. Doubt on this point is dispelled by the further provision found in the first edition, "Any person legally proving relation they will give such person ten dollars," and in the second edition, "Any person legally proving relationship to be given ten dollars." Both these sen-

tences indicate a clear intent to omit all other persons than the legatees named. The fact that both legatees are made executors without bonds has a further tendency to confirm the interpretation we here announce. The words of the second edition, "codicils to follow," do not throw any particular light upon the case as no codicils were found. Codicils may be used to restrict provisions already made; also to add new ones. Moreover, the presumption would be that on further reflection the testator decided against additional changes in his will.

We therefore conclude that while it was error to fail to probate the will in the language thereof after the interlineations were made, still no possible injury can thereby result to appellants for, as above noted, the documents are identical in meaning and legal effect.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; THOMPSON, J.; SHENK, J.; SPENCE, Justice pro tem.

WASTE, C. J., being disqualified, does not participate herein.

LANGDON, Justice.

I dissent. The jury's verdict was that the testator was incompetent, and under the settled rule stated in the majority opinion, this verdict must be tested by examining the evidence in support thereof and disregarding contrary evidence. Upon such examination, the record fully supports the conclusion of incompetency.

That insanity was prevalent in the decedent's family appears from the majority opinion, and it is likewise conceded that he was old and eccentric in his behavior. These eccentricities, however, are considered not so great as to afford evidence of incompetency, in spite of the unnatural will, which ignores relatives and leaves property to strangers, and the peculiar circumstances of its execution, and its safeguarding in the hatband of the decedent. But the brief and inadequate summary of the evidence of the contestants, set forth in the opinion, does not present the real picture.

Many witnesses, in frequent contact with Finkler, testified that in their opinion he

was mentally unsound. They further testified to conduct which can hardly permit of any other inference. He was a persistent collector of refuse and junk of no value. He had a habit of acquiring old-fashioned ladies' hats, which he would offer to his friends. He informed his friends that he was a great inventor, and among his achievements were a perpetual motion machine and a fuel for an internal combustion engine, made of human excreta. He disclosed to another that he had built an airship in the attic of his house, superior to any craft now flying, but that he refused to take the roof off the house, and hence would permit the secret to die with him. He instructed visitors to save their urine, which he used for the purpose of sharpening saws. He suffered from fear of persecution and arrest and possessed a number of loaded guns, which he carried and kept in his house. He claimed possession of supernatural power to wish evil to other persons. He also believed that there was a secret well on his premises which would supply his airplane with fuel, and was of the opinion that he had control over the water supply of San Mateo county, and could turn it off by means of a valve on his land. He described a cave connecting his home, near Redwood City, with the Golden Gate, through which people habitually passed.

On the day the will was executed, the decedent was suffering from toothache and neuralgia. He visited his dentist, who testified at length concerning Finkler's nervous, irrational condition at the time. In an attempt to extract the tooth, a local anesthetic was injected, and a quieting drug was administered. But the patient was recalcitrant and the dentist recommended a general anesthetic. Finkler thereupon left the office and went directly to Purcell's store, where he executed the will immediately. The dentist testified that in his opinion the decedent was of unsound mind at the time he left the office.

The mere fact that decedent was an employee of this court up to the time of his death is not of particular significance, in view of the testimony of respondent Taylor, clerk of the court, that in his opinion Finkler was, during the last few weeks of his life, of unsound mind. The conduct evidencing this mental unsoundness was, as stated above, not of late development, but was manifested over a period of

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May 27, 1935.

Rehearing Denied June 5, 1935.

several years, so that the jury might well conclude that the mental unsoundness which respondent Taylor observed at the period just before death was also present at the time the will was executed.

It seems to me that the jury might reasonably determine, as it did, from the recital of these circumstances, that the decedent was not possessed of the requisite testamentary capacity. I am not seriously concerned with the issue of undue influence, although Finkler's condition at the time the will was made was such that it would have required little persuasion to overcome his will, and an exceptional opportunity for Purcell to exercise such influence was presented.

I think that the recent unanimous decision of this court in *Estate of Bishop*, 39 P.(2d) 201, is wholly inconsistent with the present opinion; the evidence of incompetency in the record of that case being far less convincing than that presented in the instant case.

I am further unable to agree with the majority opinion because of its attempt to interpret the two instruments presented for probate. The holding that an holographic will may be changed by cancellation and interlineation in the hand of the testator, without new dating and signing, is sound and supported by authority; but the question whether these changes effected a different disposition of the estate is one of construction which cannot arise upon the probate of the will. It is not an issue before us, and should not be determined at this time. If the will is upheld, the meaning of the dispositive clauses should be considered in the court below on petition for distribution. For this court to decide it now when it is not in issue, and thus preclude the proper determination of the matter when it is in issue, is a procedure for which there is no justification. The result of the majority opinion is to base the judgment upon an instrument which was not the one admitted to probate by the lower court.

I may add that the record is replete with instances of improper exclusion of relevant evidence offered by contestants, similar to that recited above.

The judgment should be reversed.

1. Criminal law ⇨778(11)

Instruction on subject of accused's flight from scene of crime *held* justified under evidence in murder prosecution (Pen. Code, § 1127c).

2. Criminal law ⇨778(1)

In prosecution of wife for murdering husband, in which court fully instructed jury on presumption of innocence and reasonable doubt, refusal of requested instruction on presumption that wife loved her husband *held* not error (Pen. Code, § 1096).

3. Criminal law ⇨808½

Where statutory instruction on presumption of innocence was read to jury, defendant was not entitled to additional instruction that presumption of innocence attached to every stage of case and to every fact essential to conviction and abided with defendant throughout trial (Pen. Code, §§ 1096, 1096a).

4. Homicide ⇨308(5)

Refusal to instruct jury with reference to offense of lesser degree *held* not error in murder prosecution where there was no evidence on which jury could base verdict of guilty of lesser crime than first-degree murder.

5. Criminal law ⇨778(5)

Instruction in murder prosecution that defendant, "when killing was proved," was required to make out case in mitigation or to excuse or justify killing by proof creating reasonable doubt *held* not prejudicial error (Pen. Code, § 1105).

6. Criminal law ⇨789(9)

Defendant, in murder prosecution based on circumstantial evidence, was entitled to special instruction requested that circumstantial evidence must produce reasonable and moral certainty that accused alone committed offense charged.

7. Criminal law ⇨1173(2)

Omission in charge on circumstantial evidence of instruction that such evidence must produce reasonable and moral certainty that accused committed offense *held* not prejudicial error under evidence.

8. Criminal law ⇨823(5)

Instruction in murder prosecution that proof of motive was mere circumstance for

consideration of jury *held* not erroneous where court also stated that absence of proof of motive was circumstance in favor of accused.

9. Witnesses ⇨337(4)

In murder prosecution, permitting impeachment of defendant's testimony as to her knowledge and use of firearms by examination to show that defendant had previously possessed firearms and had before witnesses shot at a former husband *held* not error, though impeaching testimony involved particular wrongful act (Code Civ. Proc. § 2051).

10. Witnesses ⇨380(5)

State, which introduced witness in expectation that he would testify in accordance with statements contained in his verified complaint in former action, was properly permitted to contradict witness' present testimony by his prior sworn statements.

11. Criminal law ⇨1170½(1)

Error, if any, in permitting state to impeach its witness *held* not prejudicial where same evidence was elicited by independent testimony.

12. Witnesses ⇨68

In murder prosecution, trial judge did not err in himself testifying for prosecution as to time which elapsed between taps made by witness, to indicate interval of time between two groups of shots, where interval did not appear in record and trial judge had timed it (Code Civ. Proc. § 1883).

13. Criminal law ⇨656(2)

Trial judge did not exceed his proper function in taking part in examination of some of witnesses.

14. Criminal law ⇨404(4)

Whether bed and bedding from apartment of victim of homicide should remain in courtroom to substantiate and illustrate testimony in murder prosecution *held* matter within trial court's discretion, and abuse of discretion in permitting their exhibition during trial did not appear.

15. Criminal law ⇨438

Permitting removal of retouching evidences on photograph of deceased taken in his lifetime, and restoration of negative to its original condition, *held* not error in murder prosecution.

16. Homicide ⇨253(1)

Evidence *held* not to require trial judge to modify conviction for first-degree murder by reducing degree of homicide (Pen. Code, § 1181, subd. 6).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Nellie May Madison was convicted of murder, and she appeals.

Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SHENK, Justice.

The defendant was convicted of the murder of her husband, Eric D. Madison. The jury returned a verdict of first-degree murder without recommendation. The court imposed the death penalty in accordance with law. From the judgment of conviction, and from an order denying her motion for a new trial, the defendant appeals.

About 4 o'clock on Sunday afternoon, March 25, 1934, a body identified as that of Eric D. Madison was found in the room occupied by the couple in an apartment house in the city of Burbank in Los Angeles county. The evidence also showed that four out of six bullets fired from a 32-20 Colt revolver pierced the body. The shots were shown to have been fired at close range. One of them pierced the head, coming out at the corner of the left eye near the nose. Another entered the back and passed through the great aorta into the liver. Some pierced the mattress and bedding and lodged in the floor beneath the bed. Others lodged in the wall. The body of the deceased was found clad only in underwear, lying partly on the floor with the left arm over a chair. There were large blood stains on the bed linen, and the underclothing on the deceased was blood-stained. The evidence satisfactorily established that the body had been dead more than twelve hours.

On the previous Friday, March 23d, about noontime, the defendant had purchased a 32-20 calibre Spanish revolver from a secondhand dealer. At the time she made this purchase, she stated that she and her husband were going on a trip and wanted a gun. She was shown a 25

Colt automatic which she rejected, stating she "was not used to automatics." She signed an application for the Spanish gun, paid a deposit and returned for the gun the next day a little before noon. She received the gun and a few shells, the remains of a broken package. About noon-time Saturday she took the Spanish gun to a hardware store and asked for some shells that could be fired from it. She was told that the gun would have to be repaired before it could be fired. She thereupon purchased a 32-20 calibre Colt revolver and shells. She did not have sufficient money with her to pay the bill of \$31 and said she would have to get more money from her husband. About three-quarters of an hour later she returned with the money. She then explained that she and her husband wanted the gun for target practice on a week-end trip to Frazier Mountain Park and did not want to wait the required 24-hour period before she could have possession of the gun. At the store she called up the police department and asked for two persons by name, who were not available. She then went to the upstairs telephone and when she came down she reported that "Lew" had authorized her to take the gun. She left the shells for the Spanish gun at this store and departed with both guns, and shells for the Colt revolver, in her possession.

At 8 o'clock on Saturday evening the defendant sat in the lobby of the apartment house where she and her husband resided. The caretaker testified that he had a conversation with her in which he asked where her husband was. She replied in substance that he was out and might be home at 10, or 12, or 1, or 2, or not at all. That he said in a manner of "kidding," "What, another woman?" to which she replied, "Yes, another woman." About 10 minutes past 10 her husband came into the lobby, spoke to the caretaker, and then passed into their apartment without speaking to his wife. She followed him into the apartment. The record indicates that that was the last time Eric D. Madison was seen alive.

That night, about 15 minutes to 12, loud, sharp noises or "cracks" which sounded like pistol shots were heard by several of the other residents of the apartment house. Several people gathered in the hall in the vicinity of the Madison apartment looking for the source of the sounds. Some testi-

fied that they heard five shots with an interval of a few seconds before the last four, and others testified that there were six shots, with such an interval. It was in evidence that in this interval an agonizing scream was heard. The occupant of the apartment adjoining the Madisons' apartment testified that the sounds seemed to originate right outside her door, and that besides the scream she also heard some moans or groans at the termination of the succession of "cracks" or shots. The jury could believe from the evidence that the vocal sounds referred to were made by a man's voice. Others testified that the shooting was "right down the hall," meaning in the direction of the Madison apartment. The manager commenced a check-up of the apartments. She knocked on Mrs. Madison's door and asked if she had heard the shooting and whether she was all right, to which Mrs. Madison answered in the affirmative. Mrs. Madison then came out of the room into the hall and pulled the door shut behind her. She said the noise was down underneath her. She joined the others in the hall. She also made the statement that "perhaps it was from an automobile passing; that just last week an automobile had gone by with a girl screaming for help; that it was a weird place to live in and most anything was liable to happen." The defendant appeared calm and serene. She was asked if she was afraid and answered "No," and that her husband would be home in about 10 minutes.

The Warner Brothers studio was situated in the neighborhood about 500 to 1,000 feet distant from the apartment house. The deceased had been employed in the coffee shop of the studio, from which he usually returned home about 6 o'clock. The defendant was occasionally employed at the studio. That Saturday night the studio was engaged in taking a gun shooting scene in a certain film and the shooting of guns was noticeable about 1,000 feet away. Work had continued on that picture that night until about midnight. It was also in evidence that animals and fowl were kept on the studio premises; that peacocks sometimes gave shrill cries or screams; that such sounds were often heard from the studio, and that frequently the neighborhood did not settle into quiet until past midnight, but that the witnesses were not disturbed by the sounds coming from the studio.

The fears of those who had gathered in the hall of the apartment house on the night of March 24th were finally allayed by the suggestion of one of the men that the noises perhaps emanated from the Warner studio.

Mrs. Madison was seen leaving her apartment at half past 8 the next morning dressed for the street, and carrying a paper wrapped parcel. About the same time and later during the day there was seen hanging on the door of her apartment a sign which read, "Please do not disturb. I will get my laundry later." No one else was seen to leave or enter the Madison apartment until about a quarter to 4 that Sunday afternoon. At that time two persons carrying a suitcase called on the manager of the apartment house and stated that Mrs. Madison had arranged to reserve an apartment for one of them. The manager had not so been informed, and they proceeded to Mrs. Madison's room. The "please do not disturb" sign was on the door. The manager received no response to her knock and opened the door with her passkey. The body of Eric D. Madison was discovered in the condition hereinbefore described.

About midafternoon of the following day three officers arrived at the Cuddy ranch, eleven miles west of the Ridge Route highway in Kern county. They found the defendant sitting on a suitcase behind the clothes in a clothes closet off the bedroom, with a coat placed over her knees. The officers testified that Cuddy, who had been drinking during the weekend, said: "Nellie, why didn't you tell me it was murder?" The defendant had arrived at the Cuddy ranch on Sunday alone. Cuddy testified that on Monday afternoon he and the defendant were sitting in the living room and he asked her what was the matter, to which she replied that she'd had "a little trouble" with her husband and expected the officers to come after her; that about 20 minutes later, when the officers appeared in the driveway, she said, "Here they come now." When she was found in the clothes closet, she explained that she had been changing her shoes.

The sales slips for the guns purchased by the defendant were found in her purse, and the Spanish gun and some cartridge shells, wrapped in brown wrapping paper, were found in her car. The Colt revolver purchased by her was never found.

The defendant testified. She explained that she had purchased the guns at her husband's suggestion, because he had been threatened, and because they wanted to use them on a trip to Arrowhead or the Cuddy ranch; that on Saturday night when he came in, he did not take off his clothes, but prepared to leave again to see a man from Bakersfield about a job, and that if he did not come back that night she should meet him on Sunday at the Cuddy ranch, where he would stop on his way from Bakersfield; that she had given him the two guns in a package on Saturday afternoon when they were out driving and he had put them in a pocket of the car; that she could not identify photographs introduced in evidence depicting the body found in her apartment, and that she believed Eric D. Madison was still alive.

Only the salient facts and some of the testimony in support of the jury's verdict have been stated. Those facts and testimony require an affirmance of the judgment unless the record shows that claimed erroneous rulings of the court, if error, have resulted in a miscarriage of justice.

[1] The defendant contends that the court erred in giving an instruction on the subject of the accused's flight from the scene of the crime. There was sufficient in the testimony which, if believed by the jury, constituted a foundation for the giving of an instruction conformably to the provisions of section 1127c of the Penal Code. The trial court gave such an instruction, which was the only instruction permitted by the section.

[2,3] The defendant relies on *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556, to support her contention that the court should have given a requested instruction that the defendant was entitled, in addition to the ordinary presumption of innocence, to the equally favorable presumption, arising from the marital relation, that a wife loves her husband. The court was not in error in refusing to give the requested instruction. The jury was fully instructed on the subjects of the presumption of innocence and reasonable doubt, which were all the instructions on presumptions to which the defendant was entitled. (Pen. Code, § 1096.) This also answers the contention that the court, in addition to the instruction provided by said section 1096, should specifically have instructed the jury that

the presumption of innocence attaches to every stage of the case and to every fact essential to a conviction, and that it is a presumption that abides with the defendant throughout the trial of the case. The defendant concedes that the instruction provided in section 1096 of the Penal Code was read to the jury. This was all the defendant was entitled to on the subject. Section 1096a, Pen. Code; *People v. Williams*, 96 Cal. App. 215, 273 P. 1087.

[4] The court did not err in refusing to instruct the jury that it required 12 of their number to agree on a verdict, whether of the offense charged, "or of a lesser degree." The jury was otherwise properly instructed on the matter. There was no evidence offered upon which the jury, if it believed the defendant committed the homicide, could base a verdict of guilty of a lesser crime than murder of the first degree. In this case the defendant cast her all on the chance of obtaining a verdict of acquittal.

[5] Pursuant to section 1105 of the Penal Code, the court gave the following instruction: "The court instructs the jury that up to the moment when the killing is proved, the prosecution must make out its case beyond a reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation, or to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless, as before stated, the proof on the part of the prosecution tends to show the crime committed only amounts to manslaughter, or that the defendant was justified or excused in doing the act." The defendant cites *People v. Post*, 208 Cal. 433, 281 P. 618, in support of her contention that the giving of that instruction constituted reversible error. In that case an instruction pursuant to the same section was given which told the jury that when the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify "by a preponderance of evidence on his part." That is, the killing being proved, "the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden

of proof changes. It must be in some degree no matter how small, stronger than the proof of the prosecution on the other side." The giving of the quoted portion of the instruction was held reversible error in that case. There can be no similar criticism of the instruction given in the present case. The latter instruction in fact conforms to the precepts expounded in the case relied upon. The only similarity between the instructions is the omission in each of the words of section 1105 of the Penal Code that the commission of the homicide "by the defendant," being proved, etc. It was not held in the cited case that the failure to include those words constituted prejudicial error. In fact, the contrary was indicated. While we disapprove the failure to include in the instruction the full language of section 1105 in that respect, we nevertheless conclude that in the light of other instructions given, the jury was not misled.

[6, 7] The defendant was entitled to the special instruction requested to the effect that circumstantial evidence must produce a reasonable and moral certainty that the accused, "and that no other person," committed the offense charged. The court gave the instruction on the subject of circumstantial evidence which was criticised as deficient in the same respect, i. e., by the omission of the words in quotation marks, in the case of *People v. McClain*, 115 Cal. App. 505, 1 P.(2d) 1085. The failure to give the quoted portion of the requested instruction is defended by the statement that the case does not rest entirely on circumstantial evidence. But what evidence is considered direct evidence of the slaying by the defendant is not pointed out. However, an examination of the entire record points unerringly to the conclusion that, had the requested instruction been given, the jury would not have arrived at any different conclusion. The further criticism of the given instruction that it contained matter which could be construed as comment upon the facts in evidence is without merit. The matter complained of was merely definitive in character to illustrate the distinction between direct and circumstantial evidence.

[8] There was no error in the criticised instruction given on the subject of motive. The defendant claims that an instruction that proof of motive was nothing more than a circumstance to be considered by the jury, is erroneous, because evidence of

want of motive has an affirmative character favorable to the defendant. In the same instruction the court stated that absence of proof of motive is equally a circumstance in favor of the accused.

[9-11] The defendant attacks several rulings of the court in the introduction of evidence and examination of the witnesses. The court, over the objection of the defendant, permitted the prosecution to attempt to impeach the defendant's testimony as to her knowledge and use of firearms, by examination as to a circumstance designed to show that the defendant had previously possessed firearms and had before witnesses shot at a former husband. The court also permitted the prosecution to introduce prior contradictory statements of fact in that regard contained in a verified complaint for divorce filed by the former husband, who was called by the prosecution to give the impeaching testimony. It is contended that the claimed purpose of impeachment of the defendant's testimony by contradictory evidence was ostensible only, and that in fact the prosecution sought to impeach the defendant by inadmissible evidence of particular wrongful acts. (Code Civ. Proc. § 2051.) The question of the purpose of the testimony was before the trial court, and while the contention of the defendant might be considered arguable, nevertheless, as the testimony tended to contradict the defendant's testimony in the respect noted, we cannot say that the court erred in admitting the evidence for that purpose. Nor can we say that the court erred in permitting the state to show the prior sworn contradictory statements of its own impeaching witness, when it expected the witness to testify in accordance with the statement of facts contained in his verified complaint. In any event, inasmuch as the same evidence was elicited by independent testimony, the introduction of the prior sworn statements, if erroneously admitted for the purpose of permitting the state to impeach its own impeaching witness, was without prejudice.

Other contentions that prejudicial error was committed in the rulings of the court on the admission of evidence to impeach the defendant's testimony have been examined and are found to be without merit.

[12,13] The defendant claims, further, that error was committed by the trial judge's testifying in the case as a witness for the prosecution. The judge's testi-

mony related to the time which elapsed between taps made by a witness to indicate the interval of time between the two groups of shots heard by her on the night of March 24th. The interval did not appear in the record, and the trial judge had timed it. The trial judge was a competent witness to testify what that interval was. Section 1883, Code Civ. Proc. Nor is there any merit in the contention that the trial court exceeded its proper function in taking a part in the examination of some of the witnesses.

[14,15] Various specifications are made of claimed prejudicial error in permitting certain witnesses, including the ballistic expert and a mortician, to testify to certain facts. An examination of these claims indicates clearly that they are without substantial foundation.

Although we cannot give sanction to the practice of exhibiting unnecessarily to the jury gory physical evidences of the crime which are calculated or likely to inflame the jury's deliberations, nevertheless we cannot say that the exhibition during the trial of the bed and bedding from the Madison apartment necessarily was beyond propriety or had that effect. The question whether the exhibit should remain and was needed to substantiate and illustrate the expert and other testimony as to the shots fired, and whether it would tend to inflame the jury to the prejudice of the defendant, were questions addressed in the first instance to the discretion of the trial court, and no abuse of the exercise of that discretion is shown. There is no basis for the contention that the verdict of the jury was the product of any inflammation or prejudice caused by this exhibit. Nor can we discover any error in the court's permitting the removal of retouching evidences on a photograph of the deceased taken in his lifetime, and the restoration of the negative as far as possible to its original condition. There was no evidence that any altering of the negative took place other than the elimination of removable substances used in the retouching by the person who originally made the photographs.

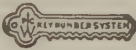
[16] The contention is made that pursuant to the provisions of subdivision 6 of section 1181 of the Penal Code the trial court should have modified the judgment so as to indicate that the defendant was guilty of murder of a lesser degree. The exercise of the power of the trial court or

of this court thus to modify the judgment without granting or ordering a new trial is dependent upon the presence of some evidence tending to prove that the defendant, if he is guilty of any crime, is guilty of a crime of a lesser degree than the crime of which he was convicted. There is no evidence in the record, nor was any offered, upon which to base the modification requested.

The other specifications of error are lacking in merit. The record discloses that the defendant had a fair and impartial trial, singularly free from anything upon which to predicate a charge of prejudicial error. The evidence is sufficient to support the verdict, and on the record the court is not justified in disturbing the judgment.

The judgment and order are affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.



3 Cal.2d 641

CITY OF LOS ANGELES v. DEACON et al.

CITY OF LOS ANGELES et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES

COUNTY et al.

L. A. 14945.

S. F. 15159.

Supreme Court of California.

May 24, 1935.

Rehearing Denied June 20, 1935.

Eminent domain  246(2)

Appeal by city within 30 days after entry of interlocutory judgment of condemnation in proceeding by city which took possession of land held not to suspend operation of 30-day period after interlocutory judgment within which city could abandon proceeding, as against contention that city had until 30 days after its appeal was finally decided within which to abandon proceeding (Code Civ. Proc. § 1251; § 1255a, as amended by St. 1933, p. 790).

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Proceeding in eminent domain by the City of Los Angeles, a municipal corporation, against A. L. Deacon and others. From an interlocutory judgment of condemnation, the city appealed to the District Court of Appeal. On hearing after judgment denying motion to dismiss the appeal by the city which also brought proceedings on certiorari against the Superior Court of the state of California, in and for the county of Los Angeles, and others.

Motion to dismiss denied.

Proceedings on certiorari dismissed.

Prior opinion, 34 P.(2d) 183.

In case L. A. 14945:

Erwin P. Werner and Ray L. Chesebro, City Attys., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and Walter L. Bruington, Deputy City Attys., all of Los Angeles, for appellant.

Oliver O. Clark and David Sallee, both of Los Angeles, for respondent C. S. Newberry.

Victor T. Watkins and Rush M. Blodget, both of Los Angeles, for respondent G. H. Deacon Inv. Co.

Dorman Scott and David Fulwider, both of Los Angeles, for respondent Union Finance Co.

In case S. F. 15159:

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Arthur Loveland, Deputy City Atty., Everett W. Mattoon, Co. Counsel, J. F. Moroney, Deputy Co. Counsel, for petitioners.

Oliver O. Clark and Victor T. Watkins, both of Los Angeles, for respondents.

PRESTON, Justice.

The above-entitled cases have been consolidated for consideration, for the reason that for all practical purposes they involve the same parties and the same subject-matter.

The city of Los Angeles filed a condemnation proceeding on June 30, 1928, involving twelve parcels of land for the purpose of condemning said lands for street purposes. The G. H. Deacon Investment Company et al., respondents in L. A. 14945, owned or had some interest in three of the parcels, designated as parcels 8, 11, and 12 in the complaint. In September, 1928, the city secured an order permitting it to take immediate possession of the twelve

parcels, including the three parcels above mentioned, after depositing in court the sums fixed by the trial court, as required by statute. Pursuant to such order the city took possession and completed the intended improvement, a portion of which is constructed on the lands of G. H. Deacon Investment Co. et al.

In due course the condemnation actions were tried, and interlocutory judgments entered as to all twelve parcels. As to nine of the parcels the amounts awarded were paid. The city appealed from the awards made for the three parcels owned by G. H. Deacon Investment Company et al. (\$119,490), and on such appeal the awards were reversed. *City of Los Angeles v. G. H. Deacon Investment Co.*, 119 Cal. App. 491, 7 P.(2d) 378. A second trial was thereupon had as to these three parcels, resulting in a judgment of \$78,223.33. The interlocutory judgment was entered January 30, 1933. Within 30 days the city appealed from this last-mentioned judgment. About a year after the appeal had been perfected and while it was still pending in the District Court of Appeal, the city, by appropriate ordinance, attempted to abandon the condemnation proceeding as to the three parcels, the ordinance reciting that such abandonment was "without prejudice." The city, in abandoning, purported to act under the provisions of section 1255a of the Code of Civil Procedure, and followed the steps therein provided.

After the ordinance of abandonment as to the three parcels had been passed and the steps required by section 1255a had been taken, the city moved to dismiss its appeal from the interlocutory judgment. The District Court of Appeal refused to dismiss the appeal, on the ground that section 1255a of the Code of Civil Procedure, properly interpreted, limited the condemnor's right to abandon to 30 days after the entering of the interlocutory decree, and held that an appeal within the 30 days did not stop the 30 days from running. This court, on petition of the city, granted a hearing. This is the proceeding entitled L. A. 14945.

The other proceeding, entitled S. F. 15159, arose as follows:

When the city took possession of the three parcels owned by G. H. Deacon Investment Company et al., in September, 1928, it was required to deposit the sum of \$4,243.84 in court as security. After the

decision of the trial court on the second trial awarding the G. H. Deacon Investment Company et al. \$78,000 plus, they moved the court for an order requiring the city to increase its security deposit. In January, 1933, the trial court ordered the city to increase its deposit by approximately \$75,000. Thereafter, in March, 1933, the District Court of Appeal issued an alternative writ of mandate directed to the trial court and to the city ordering them to show cause why the city should not be required to make the additional deposit. In July, 1933, the Appellate Court made the writ peremptory. *G. H. Deacon Inv. Co. v. Superior Court* (Cal. App.) 24 P. (2d) 534. In due course this court granted a hearing, and in March, 1934, this court ordered the peremptory writ to issue, adopting, as the opinion of this court, the Appellate Court opinion. *G. H. Deacon Inv. Co. v. Superior Court*, 220 Cal. 392, 31 P.(2d) 372. In that opinion it was held, among other things, that the deposit of the additional security would not affect the city's appeal, and that such moneys, under the appropriate Code provisions, would remain on deposit with the trial court until that appeal was finally determined. The court also held in 220 Cal. 392, page 396, 31 P.(2d) 372, 374, that: "As to the ultimate right of the city of Los Angeles to abandon said condemnation proceedings either before or after the final decree of condemnation, we express no opinion, as we do not consider that question is before us in this proceeding, and we expressly refrain from expressing any opinion relative thereto."

In the meantime, as already pointed out, in January, 1934, the city by ordinance attempted to abandon as to the three parcels owned by G. H. Deacon Investment Company et al. In May, 1934, the trial court issued a citation to the city of Los Angeles and to the proper officials thereof directing them to show cause why they should not be adjudged guilty of contempt for failing to comply with the order of the trial court directing them to deposit the additional sums, and with failing to comply with this court's peremptory writ of mandate. The city defended on the ground it had abandoned the condemnation proceedings as to these three parcels, and that therefore the duty to make further deposits no longer existed. Thereafter, the trial court, upon hearing duly had, found the city and its designated officers in contempt. The city thereupon applied for a

writ of certiorari. The G. H. Deacon Investment Company et al., the real parties in interest, seek to uphold the action of the trial court on the theory that the city has lost its right to abandon, and urge in support thereof the same grounds urged in L. A. 14945, above discussed. Later, the two proceedings were consolidated.

It is at once apparent that in both causes the sole question involved is the validity of the purported abandonment proceedings. In discussing this question, the parties herein have filed exhaustive and voluminous briefs, and have ably discussed many questions bearing more or less directly on the main question involved. In our opinion, the entire controversy turns upon the proper interpretation to be given to section 1255a of the Code of Civil Procedure. That section, as amended in 1933 (St. 1933, p. 790), so far as pertinent here, provides "plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment" by performing certain acts which were here performed, and in such event the defendants are entitled to costs, including expenses in preparing for trial and attorney's fees. The "final judgment" referred to in the above section is the interlocutory judgment. That is conceded by all concerned in the present actions. See *McDaniels v. Dickey*, 219 Cal. 89, 25 P.(2d) 404; *Colusa, etc., R. Co. v. Superior Court*, 31 Cal. App. 746, 161 P. 1011; *California Southern R. Co. v. Southern Pacific R. Co.*, 67 Cal. 59, 7 P. 123; *Lincoln Northern Ry. Co. v. Wiswell*, 8 Cal. App. 578, 97 P. 536; *Glenn County v. Johnston*, 129 Cal. 404, 62 P. 66; *Pool v. Butler*, 141 Cal. 46, 74 P. 444. Succinctly stated, the question is: In view of the above provision limiting the right to abandon to 30 days after final judgment (i. e., the entry of the interlocutory judgment) where an interlocutory judgment has been entered, and the condemnor has appealed within 30 days of the entry and such appeal is still pending, can the condemnor abandon against the will of the condemnee after the 30 days mentioned in the section have elapsed? Stated another way: Does the appeal suspend the running of the 30-day period mentioned in section 1255a?

These questions were not answered by the decision of this court in the case of *Times-Mirror Co. v. Superior Court* (Cal. Sup.) 44 P.(2d) 547. In fact, this court expressly refrained from passing on the

question of construction, and held that regardless of the question of construction the city under the facts therein disclosed was estopped from abandoning the proceedings. It should be here mentioned that the factual problem presented in the *Times-Mirror Case* was radically different from the one here involved. In the *Times-Mirror Case*, after the entry of the interlocutory judgment, the condemnee appealed and secured a reversal. Then the condemnor attempted to abandon before the new trial. In the present cases, the appeal is by the condemnor, and that appeal is still pending. The interlocutory decree is still in existence; its operation for some purposes being suspended pending the appeal. Moreover, in the present cases the condemnor has taken possession and constructed the improvement, a fact not present in the *Times-Mirror Case*.

In discussing the question of construction here presented, we start with the basic premise, for reasons already stated, that the 30 days mentioned in section 1255a started to run upon the entry of the interlocutory decree. It is an admitted fact that the city did not abandon within 30 days thereafter. So far, all the parties involved herein agree. But the city contends that because it appealed within the 30-day period, the operation of the 30 days was suspended, and that it had until 30 days after its appeal is finally decided within which to abandon. Having abandoned within the period so computed, the city contends both proceedings involved herein must be decided in its favor. The G. H. Deacon Investment Company et al. contend that the appeal did not suspend or interrupt the operation of the 30-day period; that the purpose of section 1255a is to compel the condemnor to determine within 30 days after the entering of the interlocutory decree whether it desires to abandon; that the 30 days having expired the city cannot now abandon.

The point involved has never been passed upon directly by any appellate court in this state; it is an open question. Considered as such, we agree with the contention of G. H. Deacon Investment Company et al. that once the 30-day period provided in section 1255a starts to run an appeal does not stay its operation. We are of the opinion that one of the major purposes intended by section 1255a was to compel the condemnor to decide within 30 days after the entry of the interlocutory decree whether it desires to abandon. This

does not in any way deprive the condemnor of its right to appeal. When an interlocutory decree of condemnation is entered the condemnor, in the absence of an appeal by the condemnee, knows how much the improvement will cost. If it decides not to abandon, but decides to appeal, it may do so. If the appeal by the condemnor is unsuccessful, the condemnor has lost its right to abandon, and must pay. This rule is fair and just to all concerned. The whole purpose of giving the condemnor the right to abandon is to permit it to abandon after it knows the ultimate cost of the improvement. It knows that fact upon the entry of the interlocutory decree. The rule contended for by the city in the present cases would be unfair to the condemnee, and would, in our opinion, permit a continuance of one of the evils that section 1255a was intended to prevent. If the city is correct in its contention that the appeal interrupts the running of the 30-day period and continues the right to abandon to 30 days after the appeal is decided, the following situation would be presented: The condemnor starts a condemnation action, and such action proceeds to judgment. The condemnor then knows the cost of the improvement to it. The condemnor does not elect to abandon within 30 days, but does appeal within that time. After all the briefs are in on that appeal, or even after the appeal is decided, the condemnor can elect to abandon, pay the costs, and immediately start a new condemnation proceeding, and so on ad infinitum, until a decree is rendered that seems more satisfactory to it. Such a rule would be highly unfair to the condemnee. The major purpose of passing section 1255a was to prevent the condemnor, within reasonable limits, from prosecuting successive actions. *Pacific Gas, etc., Co. v. Chubb*, 24 Cal. App. 265, 14 P. 36. As was said in *Colusa, etc., R. Co. v. Superior Court*, supra, 31 Cal. App. 746, at page 753, 161 P. 1011, 1014: "In *Union Ry. Co. v. Standard Wheel Co.*, 149 F. 698, 79 C. C. A. 386, the question involved was whether, after judgment assessing damages, plaintiff or petitioner was authorized to dismiss the proceedings as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high, and in holding to the contrary the court said: 'When a party undertakes to subject another's property to his own use, he must be deemed to

be willing and intend to pay a fair price for it, and that such fair price shall be fixed by the verdict of a jury to be approved by the court. Good faith requires that he shall not use the power of the court to vex the other party with successive experiments in the effort to get what he wants at his own price. And the public has an interest in the finality of the judgment. It will endure one litigation between parties, but not a repetition of it, to give one of them a chance to get a better result.'" It is our opinion that if the contentions of the city were to be sustained, the 30-day time limit provided for in the section would be practically meaningless, and the salutary purpose of the section avoided.

The city advances many arguments in favor of its contentions. The major argument is that in certain cases interpreting section 1251 of the Code of Civil Procedure, an appeal has been held to suspend the running of the 30-day period therein provided. Section 1251, so far as pertinent here, provides: "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. * * *" The "final judgment" therein referred to is the interlocutory judgment, and it has been held that an appeal or motion for a new trial suspends the running of the 30-day period therein mentioned. *Pool v. Butler*, 141 Cal. 46, 74 P. 444; *Lincoln Northern Ry. Co. v. Wiswell*, supra. See, also, *Mt. Shasta Power Corp. v. Dennis*, 66 Cal. App. 186, 225 P. 877, 879; *Colusa, etc., R. Co. v. Superior Court*, supra. Of course, cases holding that the 30-day period provided for in section 1251 is suspended by an appeal, are of some persuasive force on the point that the appeal also suspends the 30-day period provided for in section 1255a; but such cases are not conclusive. It is obvious that an appeal by the condemnor has to suspend the running of the 30-day period found in section 1251, because otherwise the condemnor would be compelled to pay the judgment and for all practical purposes the appeal would become moot. *Mt. Shasta Power Corp. v. Dennis*, supra. For reasons already stated, this argument does not apply to section 1255a.

Pool v. Butler and *Lincoln Northern Ry. Co. v. Wiswell*, supra, were both decided before section 1255a was added to the Code in 1911. Whatever was said in those two cases about the right to abandon ex-

isting up until the condemnor became obligated to pay the judgment, cannot assist the court in interpreting a statutory provision enacted long after such cases were decided. It is true, as urged by the city, that prior to 1911 the condemnor could abandon pending an appeal, but it is our opinion, as already set forth, that section 1255a was enacted for the purpose of preventing such an abandonment after the 30-day period has expired.

The other cases cited by the city, although also of some persuasive force, are not conclusive. The Colusa Case, *supra*, admittedly did not involve the right to abandon. It involved the right of the condemnor to refuse to pay the award pending appeal. It is simply another case holding that the provisions of section 1251 are suspended pending the appeal. *Mt. Shasta Power Corp. v. Dennis*, *supra*, also involved the right to an execution. The question of the condemnor's right to abandon after an appeal was not directly involved. There is certain language in the opinion, however, that lends some color to the city's contentions. The *Mt. Shasta Power Corporation* brought an action to condemn certain riparian rights. After the interlocutory judgment had been entered and within 30 days the condemnor appealed. It was held, in accordance with the *Colusa Case*, *supra*, that the appeal stayed the issuance of execution. The condemnor had paid the amount of the award into court, and took possession of the premises sought to be condemned. It was held that these acts constituted a waiver of the right to appeal. That is all that was actually decided by the case. At no time did the condemnor seek to abandon, nor was its right to do so involved. It is true that in referring to the argument of appellant the court said: "Appellant contends that its payment of the damages awarded the defendants was not voluntary, but that, under the provision of section 1251, herein quoted, it was compelled to make such payment within 30 days after final judgment, 'as failure to comply with this provision would have subjected appellant to liability to execution, or to extra damages upon abandonment,' as pro-

vided by sections 1252 and 1255a. An appeal by plaintiff, however, within 30 days after entry of the judgment would have operated to stay the issuance of execution under the provisions of the one section or the assessment of damages under the other. *Colusa, etc., R. Co. v. Superior Court*, 31 Cal. App. 746, 761, 161 P. 1011. Plaintiff had the option of paying the damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid." In so far as the above language refers to the effect of an appeal without taking possession, or to damages upon abandonment, such language was not necessary to the opinion. Such points were not involved. We repeat that whether the condemnor could abandon pending the appeal was not an issue in the *Dennis Case*.

The city argues at length that sections 1251 and 1255a must be construed together, and that the 30-day period in section 1251 must be construed as the same 30-day period found in section 1255a, and that when it is held that an appeal suspends the operation of section 1251 it must also be held to suspend section 1255a. It is possible to so construe the sections, but for reasons already advanced we do not think it is the proper construction. Such a construction would effectually evade one of the very purposes we believe the Legislature had in mind when section 1255a was passed.

Many other questions are exhaustively argued and briefed by counsel. It is not necessary to here pass upon those questions. For the purposes of this opinion we assume that the condemnor's right to abandon is measured by section 1255a, and hold that under that section the attempted abandonment here involved was ineffectual.

For the foregoing reasons, the motion to dismiss must be denied and the proceedings on certiorari dismissed.

It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.

3 Cal.2d 732

CALIFORNIA SECURITIES CO. v. GROSSE
et al. (two cases).
L. A. 14373, 14374.

Supreme Court of California.
June 7, 1935.

1. Mortgages ⇨504

Mortgagee *held* not precluded from foreclosure on ground that economic depression made payment impossible and constituted defense of impossibility of performance.

2. Mortgages ⇨393

Alleged oral extension agreement *held* not to preclude foreclosure of mortgages (Civ. Code, § 1698).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Actions by the California Securities Company against Charles E. Grosse, Hester M. Grosse, and another. From judgments for plaintiff, named defendants appeal. On plaintiff's motions to dismiss appeals or affirm judgments.

Motions granted and judgments affirmed.

Hiram E. Casey and Horace W. Danforth, both of Los Angeles, for appellants.

Swanwick, Donnelly & Proudfit, R. W. Proudfit, and Donald O. Welton, all of Los Angeles, for respondent.

PER CURIAM.

[1,2] Motions have been made by plaintiff and respondent to dismiss the appeal or affirm the judgment, in each of the above actions for foreclosure of mortgages on real property. Defendants Charles E. Grosse and Hester M. Grosse appealed on the ground that the prevailing economic depression made payment of their loan impossible, and therefore constituted the defense of impossibility of performance. It was further urged that plaintiff was estopped by reason of an alleged oral agreement of extension made by its officers. That the depression cannot constitute a defense to a foreclosure proceeding is clear. *Brennan v. American Trust Co.* (Cal. Sup.) 45 P. (2d) 207. The lower court, considering conflicting evidence, found against the defense of estoppel; and it is settled, of course, that an unexecuted oral modifica-

tion of a written contract is ineffective. Civ. Code, § 1698.

The motions are granted and the judgments are affirmed.



7 Cal.App.2d 357

SMITH v. PARLIER WINERY, Inc., et al.
(ROBELLO et al., Interveners).
Civ. 1364.

District Court of Appeal, Fourth District,
California.
June 3, 1935.

Limitation of actions ⇨146(2), 148(4)

Cause of action on corporation's note *held* barred by limitations, where complaint was not filed until over four years after due date of note and execution of instrument informing payee of directors' resolution that note be extended for 18 months, pursuant to alleged oral agreement; such agreement not being executed, where no part of principal or interest was paid, nor supported by any consideration (Code Civ. Proc. §§ 337, 360; Civ. Code, §§ 1661, 1698).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by F. W. Smith against the Parlier Winery, Inc., and others, in which Alfred E. Robello and others intervened. From a judgment for plaintiff, named defendant and interveners appeal.

Judgment against named defendant reversed.

Cross & Brandt, of San Francisco, for appellants.

Martin C. Thuesen, of Fresno, for respondent.

MARKS, Justice.

This is an action on a promissory note executed by the Parlier Winery, Inc., to Wylie M. Giffen and assigned to plaintiff.

On June 1, 1928, the Parlier Winery, Inc., executed and delivered to Wylie M. Giffen its promissory note for \$28,000, payable one day after date, with interest at the rate of 7 per cent. per annum. On

June 1, 1929, the following writing was delivered to Giffen:

"June 1, 1929.

"At a special meeting of the Board of Directors of Parlier Winery held on the above date, the following resolution was adopted:

"Resolved: That the vice-president and secretary of the Parlier Winery extend the note of Wylie M. Giffen for eighteen months for twenty-eight thousand dollars (\$28,000).

"[Seal.] W. J. Lohman, Secty.

"Wm. W. Parlier, Vice-Pres."

This action was commenced on October 31, 1933. Judgment went for plaintiff, and this appeal followed.

The sole question to be decided is: Assuming that the writing of June 1, 1929, is a sufficient acknowledgment of the indebtedness to toll the statute of limitations under the provisions of section 360 of the Code of Civil Procedure, when does the statute of limitations again commence to run; immediately upon the execution of the document, or eighteen months thereafter? It is obvious that as the action was commenced on October 31, 1933, more than four years after the due date of the note, and more than four years after the execution of the instrument dated June 1, 1929, the cause of action was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure, unless there was a valid contract extending the time of payment of the note for eighteen months after June 1, 1929.

Appellants urge that there was no valid agreement extending the due date of the note for eighteen months after June 1, 1929, because (1) the agreement, if any, was parol, and (2) it was not supported by any consideration.

It is not questioned that the note of June 1, 1928, was the valid obligation of the Parlier Winery, Inc. It was indorsed by W. J. Lohman, William W. Parlier, and R. K. Madsen. These individuals were the officers and directors of the corporation. R. K. Madsen died some time between the date of the note and June 1, 1929.

No interest or any part of the principal was paid, and early in 1929 Giffen requested payment from the corporation. Lohman and Parlier told him the corporation could pay nothing but that they were negotiating for additional capital so the corporation could make concentrates and derive suffi-

cient revenue to be able to pay the note; that they could not obtain this capital because the unpaid note was past due. They wanted the corporation to execute a new note, but Giffen refused to accept it "because he said that he wanted to hold the Madsen estate, as Madsen had been one of the endorsers on the note." Lohman and Parlier testified that Giffen said "he would work with us," that "he would wait until fall"; that "he would not bother us for eighteen months"; and that Giffen "wouldn't take a new note, as he did not want to release the Madsen estate as Mr. Madsen had been a guarantor on the note." This is all of the evidence in the record bearing upon an agreement to extend the time of payment of the note for eighteen months from June 1, 1929. It is admitted that nothing was ever paid on the principal or interest of the note.

Section 1698 of the Civil Code provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Section 1661 of the same Code provides: "An executed contract is one, the object of which is fully performed. All others are executory."

In *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 P. 736, 739, a case factually similar to the instant case was before the court. There it was contended, as here, that although the agreement for extension was not in writing, it was executed by the payee of the note permitting the time of the extension to expire without bringing suit which brought the case within the provisions of section 1698 of the Civil Code. The court in the *Dean Case* disposed of this contention as follows: "Appellant claims that, one year having elapsed before suit was brought, the agreement was executed, at least, in part, by the creditor, and this was sufficient although no payment was made as agreed. * * * Can it be said that the agreement was executed in part? An 'executed contract' is one in which both parties have fully performed the terms of the contract; a contract performed on one side only is not an executed contract. 9 Cyc. 244; 7 Am. & Eng. Ency. of Law (2d Ed.) p. 95; 1 Page on Contracts, § 18. In *Pearsall v. Henry*, 153 Cal. [314] 315, 325, 95 P. 154, 157 [159], the court, through Mr. Justice Sloss, said: 'According to section 1661 of the Civil Code, an executed agreement is one "the object of which is fully performed. All

others are executory." * * * An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligation of both parties in order to bring the modification within the terms of the statute.' Citing numerous cases. See, also, *Henehan v. Hart*, 127 Cal. 656, 60 P. 426." See, also, *Rottman v. Hevener*, 54 Cal. App. 474, 202 P. 329. It is obvious that the contract in the instant case was not executed by the Parlier Winery, Inc., as no part of the principal or interest was paid by it or the indorsers on the note.

In the case of *Dean v. Sedan Milling Co.*, supra, the question of a contract extending the time of payment of the note failing because of lack of consideration was also disposed of. The court there said: "In *Stroud v. Thomas*, 139 Cal. 274, 72 P. 1008, 96 Am. St. Rep. 111, the surety on a promissory note sought exoneration on the ground, among others, that the principal extended the time of payment of the note for a valuable consideration. The consideration relied on was the payment of overdue interest. Said the court, speaking through Mr. Justice Shaw: 'The money paid was due to the plaintiff by reason of the previous obligation. No additional benefit was received by the plaintiff and none could be conferred by the principal debtor by the payment of money on the obligation already existing and past due. * * * A promise made without a consideration is not binding. Consequently, the agreement for the extension of time was not a valid promise, and would not bind the plaintiff to forbear suit upon the note during the time specified in the agreement.'"

The case of *Middlecamp v. Zumwalt*, 100 Cal. App. 715, 280 P. 1003, 1006, is also factually similar to the instant case, in that the plaintiff in that case relied upon two oral agreements to extend the time of payment of a promissory note; nothing having been paid on the note during the time of these extensions. The court there said: "The oral testimony relating to the extension of time upon which the court found that the time of payment of the note was extended, is relied upon by the respondent as a waiver of the right of the defendant to demand payment or insist up-

on a forfeiture or proceed to take possession of the property until after August 1, 1928. The testimony of course shows that it was in no sense a waiver. It was simply, if anything, an oral agreement for the extension of time of payment of a promissory note. In the first place, the testimony shows, and the record conclusively establishes, that there was no consideration of the promise to extend the time of payment of the promissory note in the event such promise was made. Section 1550 of the Civil Code provides that every contract must have a sufficient consideration. Whether the contract made in 1926, extending the time of payment of the promissory note until August 1, 1927, was or was not made as alleged by the plaintiff and found by the court falls within the category of an executed contract, is wholly immaterial from the fact that under the provisions of section 1550 of the Civil Code it never did rise to the dignity of an enforceable agreement and did not constitute, for lack of consideration, an extension of time. The court found that prior to August 1, 1927, the defendant extended the time of payment of the note until August 1, 1928. This finding is based upon the oral testimony to which we have referred. Likewise there is an absolute want of consideration for any such extension of time. This so-called extension of time, being oral and not to be performed within one year, is void, as contrary to the statute of frauds, and furthermore is violative of the terms of section 1698 of the Civil Code, which reads: 'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' It is thus seen that the finding of the court as to the extension of time has no support in the testimony."

It appearing that there was no valid agreement between Giffen and the Parlier Winery, Inc., extending the payment of the note after June 1, 1929, and the complaint not having been filed until October 31, 1933, the cause of action was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure.

The judgment against the Parlier Winery, Inc., a corporation, is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

7 Cal.App.2d 449

CRAWFORD v. SENEGRAM et al.
Civ. 9250.District Court of Appeal, Second District,
Division 1, California.

June 7, 1935.

1. Trial ☞375

In assault and battery action, refusal of trial court sitting without jury to view premises where altercation took place *held* not error, where premises were diagrammed and thoroughly explained by witnesses.

2. Trial ☞377(2)

In assault and battery action tried to court without jury, refusal to reopen case upon motion of defendant for receipt of further evidence *held* within court's discretion, where facts sought to be proved were set forth in affidavits, and in denying motion court must have thought that proffered evidence would not have altered court's conclusions as to facts.

3. Pleading ☞339

In assault and battery action tried to court without jury, refusal to allow defendant to withdraw amended answer wherein defendant admitted use of force to remove plaintiff from defendant's office *held* not abuse of discretion, where by original verified answer and in testimony defendant denied use of force, and apparent contradiction bore upon defendant's credibility.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Grace A. Crawford against S. Senegram, individually, and Philip Senegram and another, doing business under the fictitious firm name and style of Philip Senegram Company. From a judgment for plaintiff, Philip Senegram appeals.

Affirmed.

Henry Haves, of Los Angeles (Michael M. Moser, of Los Angeles, of counsel), for appellant.

Birger Tinglof, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Action for damages for assault and battery. Plaintiff had judgment by the court without a jury, from which defendant appeals. Upon conflicting evidence, the court found that the defendant Philip Senegram committed acts of violence upon the person of plaintiff, consisting of seizing and injur-

ing her arm in an argument in the defendant's office. The testimony of plaintiff, corroborated by that of her husband, who was present, is ample to sustain the findings of the court.

[1] One of the alleged errors relied upon by appellant is that the court refused to view the premises where the altercation took place. Another point is that the court declined to reopen the case upon motion of the defendant, for the receipt of further evidence, and a third point is that the court refused to allow the defendant to withdraw an amended answer which he had verified and filed during the trial of the case. The argument advanced for a reversal of the judgment is wholly without merit. The premises in question were diagrammed and thoroughly explained by the witnesses. It clearly appears from the record that the court very correctly deemed a view of the premises to be unnecessary.

[2] The additional testimony sought to be introduced on a reopening of the case related to a matter of impeachment of the testimony of plaintiff by contradictory evidence. The facts sought to be proved were set forth in affidavits, and it was not questioned that the witnesses sought to be called would have testified in accordance with the statements contained in the affidavits. In denying the motion, the court doubtless declined to receive the proffered evidence for the reason that the same would not have altered the court's conclusions as to the facts. The ruling was a proper exercise of the court's discretion, and is therefore conclusive.

[3] The amended answer, verified by the defendant, admitted the use of force to remove plaintiff from the office of defendant. By his original answer and in his testimony, the defendant denied the use of any force. After the amended answer was filed, when questioned by the court as to his inconsistent statements, defendant testified that he signed and made oath to the verification at the request of his attorney and without reading the amended answer or knowing what it contained. His counsel then requested leave to withdraw the answer, which the court denied. The granting of the application would not have altered the facts. Defendant made at least two sworn statements inconsistent with each other. In asking to withdraw the answer, defendant evidently sought to evade responsibility for his contradictory statements. No reason appears

why he should have been granted this privilege. The court had before it the sworn admission by defendant of the use of force upon the person of plaintiff and also heard his explanation as to the circumstances of his verification of the pleading. If, as he now contends, the trial court was of the opinion that these contradictions bore strongly upon the defendant's credibility, we can see nothing improper or unreasonable in that deduction and nothing of which defendant can complain.

The case was tried by the court in a painstaking manner. It was reopened twice at the request of defendant to allow additional evidence. The only question to be determined by the court was one of fact. The trial was in every respect a full and fair hearing of the evidence on both sides.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 268

ROBINSON v. WALKER.

Civ. 10184.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1935.

Rehearing Denied June 24, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

Trial $\Rightarrow$ 397(1)

In action for breach of employment contract, where plaintiff, after discharge, was rehired by defendant under mutual understanding that rehiring was not to affect breach but only to minimize damages, court was not required to make finding as to reasonable value of services before rendering judgment for plaintiff, where court had before it the account between the parties as to both unpaid balance for services and amount found as damages.

Appeal from Superior Court, Los Angeles County; Maurice T. Dooling, Judge.

Action by Johnny Robinson against S. F. Walker. Judgment for plaintiff, and defendant appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Defendant appeals from the judgment upon the judgment roll. The parties to the suit entered into a service contract whereby the sum of \$3,750 was to be paid to respondent. One-half of the contract had been performed when appellant discharged respondent. He had paid respondent \$915.60, leaving \$959.40 unpaid for the proportionate part of the contract performed. The court found that appellant was indebted to respondent in the sum of \$959.40 and \$1,875 damages, or a total of \$2,834.40, less a set-off herein about to be explained.

A few days after the discharge, appellant, in part to minimize his damages, again employed respondent under the mutual understanding that the contract breach would not thereby be cured, and paid respondent up to the expiration date of the original contract the further sum of \$1,386.28. This, subtracted from \$2,834.40, the total remaining unpaid under the original contract, leaves the sum of \$1,448.19, and the court gave judgment for that sum.

Appellant claims that, inasmuch as the rehiring was not to effect the breach but was to minimize the damages, all of the earnings after the rehiring should be credited to the damages resulting from the discharge and none of it to the unpaid portion of the period before the discharge. Upon this theory he argues that the court should have made a finding as to the reasonable value of the services and that the cause should be reversed because this was not done. The fallacy of the argument is that the court had before it the account between the parties as to both the unpaid balance for services and the amount found as damages. Appellant's total obligation to respondent was \$3,750. He paid \$2,391.81, leaving unpaid the sum awarded in the judgment.

Judgment affirmed.

We concur: CRAIL, J.; FRICKE, Justice pro tem.

7 Cal.App.2d 131

CALIFORNIA WESTERN HOLDING CO.,

Limited, et al. v. MERRILL et al.

Civ. 8921.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1935.

Rehearing Denied June 18, 1935.

Hearing Denied by Supreme Court
July 23, 1935.

1. Licenses ⇨39

That corporation has been regularly formed and that permit to issue stock has been regularly obtained and that stock so issued accurately reflects share of subscriber in corporate enterprise does not make preorganization subscription anything but a preorganization subscription, which will not be valid unless all requirements of Corporate Securities Act have been complied with (St. 1925, p. 972, § 25).

2. Licenses ⇨18½

Agreement whereby domestic and foreign corporations were to be organized and subscribers were to subscribe to units of stock and were to be prohibited from withdrawing subscriptions if at certain period certain number of units was sold held "preorganization subscription agreement" within Corporate Securities Act requiring certain conditions precedent to make valid preorganization subscription to stock of domestic corporation (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, pp. 970, 972, §§ 13, 14, 25, and p. 962, § 2, subds. 4, 7 (a, d), and 9; Civ. Code § 2216 et seq.).

3. Licenses ⇨39

Under Corporate Securities Act, conditions precedent to validity of preorganization subscription to stock of domestic corporation, of setting subscription forth in articles of incorporation, of completing incorporation of company within 90 days after subscription is taken, and of making application to commissioner of corporations for permit to issue stock in accordance with preorganization subscription within reasonable time after incorporation, must be complied with, and failure to conform to any condition invalidates subscription (St. 1925, p. 972, § 25).

4. Licenses ⇨39

Preorganization subscriptions to stock of foreign corporation are void (St. 1925, p. 972, § 25).

5. Licenses ⇨5

Legislature may regulate sale of securities of foreign corporation in state.

6. Licenses ⇨39

Corporations suing on preorganization stock subscription agreement had burden to affirmatively plead incorporation within 90 days after execution of agreement (St. 1925, p. 972, § 25).

7. Licenses ⇨39

In corporations' action on preorganization stock subscription agreement, it would be presumed that subscription was not set forth in articles of incorporation as required by Corporate Securities Act, where complaint failed to plead that subscription was so listed (St. 1925, p. 972, § 25).

8. Licenses ⇨39

Corporations held not entitled to recover on preorganization stock subscription agreement, where pleadings affirmatively showed that permit was not issued to either corporation, as distinguished from original committee mentioned in agreement, until August 6, 1930, and date of agreement was January 15, 1929, and date of subscription of defendants' decedent was July 29, which period was too long a delay under Corporate Securities Act (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, p. 972, § 25).

9. Licenses ⇨39

As respects right to recover on preorganization stock subscription agreement, trustees named in agreement with powers to organize corporations and collect funds were "trustees of express trust" (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, p. 962, § 2, subds. 3, 4; Civ. Code § 2216 et seq. and § 2219).

[Ed. Note.—For other definitions of "Trustee of Express Trust," see Words & Phrases.]

10. Licenses ⇨18½

Preorganization subscription agreement purporting to sell units of stock at price set forth in agreement held "sale" of securities within Corporate Securities Act (St. 1925, p. 962, § 2, subd. 9).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

11. Licenses ⇨39

Corporations' acceptance of stock subscriptions before either corporation had permit as required by Corporate Securities Act held void (St. 1917, pp. 675, 679, §§ 3, 12).

12. Licenses ⇨39

Provisions of Corporate Securities Act in force at time preorganization stock subscription agreement was made became part of agreement, and compliance with terms of act as well as with provisions of agreement had to be pleaded in action on subscription (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, pp.

970, 972, §§ 13, 14, 25 and p. 962, § 2, subds. 4, 7 (a, d), 9; Civ. Code, § 1439).

13. Licenses ⇨39

In corporations' action on preorganization stock subscription agreement, complaint which failed to plead compliance with law as well as with provisions of agreement *held* demurrable (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, p. 972, § 25).

14. Pleading ⇨34(4)

Where complaint in action on preorganization stock subscription agreement alleged that corporations tendered shares to subscriber in accordance with terms of agreement and permit, but terms of permit were not pleaded, court had right to assume, in face of demurrer for uncertainty, that, if pleaded, terms of permit would be against pleader, where no attempt was made to correct evasive allegation.

15. Pleading ⇨34(2)

In corporations' action on preorganization stock subscription agreement, wherein direct averments were made showing failure to comply with agreement, in face of failure to clarify evasive allegations to which objections were made upon demurrer for uncertainty and ambiguity, corporations' general allegation of performance did not help pleading.

16. Licenses ⇨39

In corporations' action against executors on preorganization stock subscription agreement executed by testator, complaint *held* not to state cause of action, either on agreement or on theory of assumpsit, where subscriptions were void because of failure to comply with Corporate Securities Act (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, pp. 970, 972, §§ 13, 14, 25, and p. 962, § 2, subds. 4, 7 (a, d), 9; Civ. Code §§ 1439, 2216 et seq.).

17. Pleading ⇨8(1)

Allegation of conclusion of law tenders no issue.

18. Pleading ⇨229

Generally, litigant is entitled to amend defective complaint at least once to properly state cause of action, but, if it is apparent from facts alleged in original complaint that no cause of action can be stated and proposed amended complaint fails to set out vital elements of good cause of action, leave to amend should be denied.

19. Pleading ⇨243

If proposed amended complaint stated cause of action or suggested that cause of action could be stated, notwithstanding, as presently framed amended complaint did not

state cause of action, permission should *have* been granted for filing of amended complaint.

20. Licenses ⇨39

Corporations suing on preorganization stock subscription agreement which was void because of failure to comply with Corporate Securities Act *held* properly denied right to file amended complaint purporting to allege cause of action on ground that new contract was made subsequent to agreement, where amended complaint affirmatively disclosed that no stock was issued or delivered, and that subscriber paid nothing after issuance of permit to corporations as distinguished from members of management committee (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, pp. 970, 972, §§ 13, 14, 25, and p. 962, § 2, subds. 4, 7 (a, d), 9; Civ. Code §§ 1439, 2216 et seq.).

21. Licenses ⇨7(1)

Corporate Securities Act *held* constitutional (St. 1917, p. 673, as amended).

22. Licenses ⇨39

As respects corporations' right to recover from executors on preorganization stock subscription agreement executed by testator, which agreement was void because Corporate Securities Act was not complied with, parties *held* not in *pari delicto* (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, p. 972, § 25).

23. Licenses ⇨39

As respects corporations' right to recover on preorganization stock subscription agreement which was void because Corporate Securities Act was not complied with, that management committee of proposed corporations acted in good faith *held* immaterial (St. 1917, pp. 675, 679, §§ 3, 12; St. 1925, p. 972, § 25).

Appeal from Superior Court, Los Angeles County; Rubin S. Schmidt, Judge.

Action by the California Western Holding Company, Limited, and another against R. D. Merrill and others, as executors of the last will of Don Lee, deceased, wherein defendants filed a demurrer. From a judgment of dismissal entered after an order sustaining the demurrer without leave to amend and from an order denying motion for leave to amend, plaintiffs appeal.

Judgment of dismissal affirmed, and appeal from order refusing permission to file amended complaint dismissed.

Frank James and Everett H. Mills, both of Los Angeles, for appellants.

Guy T. Graves, of Los Angeles, for respondents.

David R. Faries, McIntyre Faries, and J. Clifford Argue, all of Los Angeles, amici curiæ.

ROTH, Justice pro tem.

This is an appeal from a judgment of dismissal, entered after an order sustaining a demurrer without leave to amend, and from an order denying a motion for leave to amend. The complaint is based upon "subscription agreement for shares of stock of proposed corporations * * *" dated January 15, 1929, which will hereafter for convenience be referred to as agreement. The agreement set up a management committee, which was empowered to fill any vacancies occurring in the membership of the committee, and to incorporate the two companies therein provided for, and to do and perform all acts and things necessary to effectuate the purpose thereof.

The agreement recites that it is proposed to create two corporations, the first to be known as California Western Holding Company, a California corporation, and the second, the Ritz Carlton Hotel Company of Los Angeles, a Delaware corporation, which corporations will for brevity hereinafter be called holding company and operating company, respectively. The holding company was to be organized under the laws of the state of California with a capital stock structure of 14,000 shares of common stock at \$100 par value for each share, the management committee was authorized to name the number of directors of this corporation from among the subscribers to the agreement or other persons, the holding company was then to acquire certain property, which will be referred to as the Krotana Hills site, and, after the acquisition thereof, to construct thereon an hotel. The operating company was to be organized under the laws of the state of Delaware, the board of directors to be named by the management committee in the same way as that of the holding company, with a capital stock structure of 37,500 shares divided into 12,500 preferred of a par value of \$100, with cumulating dividends of 8 per cent. per annum and other inviting features, and 25,000 shares of common without par value.

The agreement proceeds to recite that the operating company will thereupon lease the hotel from the holding company, furnish and equip the same, and negotiate an agreement for the actual management of

the hotel with the Ritz Carlton Management Corporation, a New York corporation, under license from the Carlton Investing Company, a Delaware corporation. It will be observed, and the agreement does in fact so recite that the objective of the management committee was to build an hotel on the Krotana Hills site that would be a part of the Ritz Carlton chain of hotels.

In the agreement, it is proposed to sell to and the subscribers thereto contract to buy units of stock comprising one share of the stock of the holding company and one share of the preferred and one share of the common stock of the operating company for \$170 per unit, payable 20 per cent. each at intervals "of not less than six months on demand of the treasurer or other authorized person pursuant to resolution of the boards of directors. * * *" The units so sold were subject to the agreement made by the operating company and the Ritz Carlton Management Corporation to place 5,000 shares of the common stock of the operating company, together with an additional 10,000 shares of the same stock, which was to be issued to the Ritz Carlton Management Corporation, in a voting trust. Thereafter provisions were made for issuance, indorsement, and delivery of the stock contracted to be purchased by the various subscribers to a depository for a period of one year, giving the right to each subscriber to sell during the year at certain prices, to join a pool, or to withdraw the stock, all on certain conditions the specific nature of which is not material.

The agreement further recites that the subscribers thereto, "in consideration of their mutual promises, do severally agree to and with each other and *with said Holding and Operating Companies* that they will take and pay for, and that they do hereby severally subscribe to * * * the number of units set opposite their respective names * * * at \$170 per unit. * * *" It is also provided that any subscriber may withdraw his subscription if, within one year after February 1, 1929, 8,000 units shall not have been "subscribed for, or otherwise disposed of." Finally, it is provided, "subscriptions are subject to the approval of the Commissioner of Corporations of the State of California."

The complaint, to which a demurrer was sustained without leave to amend, alleges that the management committee, together with divers other persons and corporations, who executed the agreement, associated

themselves together for the purpose of consummating the object of the agreement, and that the defendant Don Lee was one of those persons, and subscribed for 74 units at a total purchase price of \$12,580, that the subscriptions taken were made between January 15, 1929, and December 18, 1929, and that on December 18, 1929, more than 8,000 units had been subscribed for. The exact date of these subscriptions is not alleged in the original complaint (although in the amended complaint the date of defendant Lee's subscription is set out as July, 1929), and, while the terms of purchase are alleged as recited in the agreement, it is not alleged whether or not defendant Lee paid the first 20 per cent. of the purchase price upon the date of execution of the subscription; the only allegation in this respect being that a payment was made by Lee "on or about May, 1931," in the amount of \$2,516. It is alleged that the management committee caused the organization of the holding company, and that its articles of incorporation were filed October 4, 1929, with the secretary of state, and a certified copy thereof filed with the county recorder of Los Angeles county on October 7, 1929. The object, capital structure, and official personnel of the holding company is then set forth, followed by an allegation that the holding company has carried on, and is carrying on, the business contemplated by the agreement. Then follow allegations reciting the incorporation of the operating company in Delaware on January 13, 1930, filing of the articles of incorporation with the secretary of state of California on April 1, 1930, and the filing of a copy thereof with the county recorder of Los Angeles county on April 5, 1930, and also that a resident agent for the service of process and as otherwise required by law was designated; such designation being filed with the secretary of state of California. Appropriate allegations follow showing the object, capital stock structure, election of its board and official personnel, and that it is now and at all times to date has been carrying on the business contemplated by the agreement.

The acceptance by the companies and the succession to the agreement is then recited, although the exact or approximate date is not alleged, followed with allegations that, in reliance thereon, the holding company purchased the Krotona Hills site and additional lands contiguous thereto "to secure a better site for said hotel," that payments had been already made thereon, and that,

in order to pay the balance, it was necessary to obtain the balance of the money due on subscriptions made by the various subscribers in the agreement.

The complaint further alleges that on June 30, 1930, the operating company agreed with the Ritz Carlton Management Corporation of New York and the Carlton Investing Company of Delaware, pursuant to which permission was received to use the names Ritz and Carlton singly or in combination, and whereby the New York corporation undertook to manage the hotel for a period of 21 years with a renewal privilege of 21 years more. The issuance of the 5,000 shares of the capital stock of the operating company for purposes of a voting trust is then alleged, as provided for in the agreement, although nothing is said about the 10,000 shares of stock which were to be issued to the Ritz Carlton Management Corporation and placed in a voting trust as required in the agreement. It is then alleged that on December 19, 1929, the management committee had issued to members thereof a permit by the commissioner of corporations, authorizing the committee, as trustee, to offer for sale, negotiate for sale, and take subscriptions for, shares of stock of the holding company and operating company in units, as provided for in the agreement, not to exceed 8,790 units at \$170 per unit, and to collect not to exceed 20 per cent. of the sale price thereof. Nothing is alleged as to what, if anything, the permit provided as a mode of calling the balance. The permit is not made a part of the complaint, other than by the pleading of certain of its terms, and, from the method of its allegation, the only conclusion which can be drawn is that the permit was issued to permit future subscriptions and said nothing about those already taken. Allegation is then made that on August 6, 1930, the commissioner of corporations on application of the holding company and the operating company "issued his supplemental permit to said respective * * * corporations to sell and issue to the persons recited in said permit, which included the subscribers to said agreement of January 15, 1929, not to exceed 8,790 shares" of both companies in units, as provided for in the agreement, for cash or 20 per cent. cash and the balance in cash installments payable in two years from date. On May 20, 1932, it is alleged that the commissioner of corporations amended the previous permits extending the period thereof from August 6, 1932, to August 7, 1933. The allegations show that a

total of \$5,032 was paid by defendant Lee on his subscription, and it is definitely alleged that one payment of \$2,516 was made in May, 1931, which appears to be the first payment; when the second was made does not appear. Allegations are made concerning the holding of directors' meetings, the passing of resolutions at the same relative to the call for additional installments, and the making of said additional calls, and the persistent refusal of defendant to heed the same, and that they were not heeded, that no other sums were paid, and that \$7,548 remained due on the subscription and that no part of it was paid.

There is a second cause of action in form of assumpsit, predicated upon and alleging the agreement referred to, alleging an unpaid balance of \$7,548 on the subscription of the defendant Don Lee, that no part of said balance has been paid, and requesting judgment for that amount.

At the time respondent made his subscription, the portions of the Corporate Securities Act which are of immediate relevancy to the situation presented were section 25 (St. 1917, p. 685, § 25, as amended by St. 1925, p. 972), section 2, subds. 3, 4, and 5, section 2, subd. 7, pars. (a) and (d), and subdivision 9 (St. 1917, p. 673, § 2, subds. 3-5, 7 (a, d), 9, as amended by St. 1925, p. 962), and sections 3, 12, 13 and 14 (St. 1917, pp. 675, 679, §§ 3, 12; pp. 679, 680, §§ 13, 14, as amended by St. 1925, p. 970).

All references to the Corporate Securities Act made herein are made to the act as it existed at the time the subscription agreement in question was executed, to-wit: The Corporate Securities Act, as amended to and including 1927. The pertinent portion of section 25 is as follows: "Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in the articles of incorporation; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter and, when incorporated, shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; * * * nor except as may be specifically required by any law of this state, nothing herein contained shall be construed as permitting the taking of subscriptions for any security of any company other than a domestic corporation nor to make collec-

tion of any portion of the consideration to be paid on account of subscriptions unless and until a permit shall have been issued by the commissioner authorizing the taking of such subscriptions or the collection thereof."

A mere reading of the foregoing excerpt demonstrates that three conditions precedent were at that time required to make valid a preorganization subscription to the stock of a domestic corporation; i. e.: (1) Setting it forth in the articles of incorporation; (2) completing the incorporation of the company within 90 days after subscription is taken; (3) making application to the commissioner of corporations for a permit to issue stock in accordance with the preorganization subscription within a reasonable time after incorporation.

The decisive questions on this appeal are: First, whether the agreement, the terms of which have been substantially outlined, is a preorganization subscription agreement within the meaning of section 25 of the Corporate Securities Act; and, second, if it is, has the conduct of the parties, as pleaded in the original complaint or in the proposed amended complaint which will be treated hereinafter in more detail, created a new valid agreement, binding upon the parties under the doctrine announced in *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220.

Appellants contend that the agreement is not one within the purview of section 25, but rather a preliminary agreement for the organization of conventional corporate agencies to be utilized by the parties for the construction and operation of an hotel under an arrangement by which units of stock of the corporation are to be issued after a permit has been obtained to evidence their respective contributions to the hotel project as members of a syndicate; that, considered as such, it is not a subscription for "securities" as defined by the Corporate Securities Act, but a transaction by which the persons who signed the agreement provide the method of giving back to themselves certificates for shares of stock in the companies to be subsequently organized, to be issued under a permit of the commissioner of corporations as paper evidence of their interests in the enterprise.

[1] There may be some distinction between a preorganization subscription agreement, as contemplated by the Corporate Securities Act, and the type of agreement which appellants have defined as above, and which they assert is the kind of transaction

involved in the instant case. If there is such a distinction, it is of so nice and refined a nature that it might have been a subject for debate for the schoolmen of the Middle Ages, but it can hardly be said to be of any particular utility in the field of corporate activity of this day. Almost every preorganization subscription in which a number of parties join is a preliminary agreement utilized by its signatories for the formation of a corporation for purposes which are either set out or kept out of the agreement, and no stock can be legally issued until a corporation is formed and a permit obtained, and, when the stock is so issued, it represents the proportionate shares of the subscribers in the corporate enterprise; but the mere fact that the corporation has been regularly formed and that the permit to issue stock has been regularly obtained, and that the stock so issued accurately reflects the share of the subscriber in the corporate enterprise, does not make a preorganization subscription anything but a preorganization subscription, nor will these factors make such a subscription valid unless all the requirements of the Corporate Securities Act with reference to such subscriptions have been complied with.

[2,3] In our opinion, the agreement in question must be construed as a preorganization subscription agreement within the scope of the Corporate Securities Act. The parties themselves have called it a "subscription agreement," its language and terms make it apparent that it is a subscription agreement irrespective of its title, and finally case construction of similar agreements as well as definitions of terms set forth in the Corporate Securities Act, brand it with finality as such. *Olds v. Simmons*, 123 Cal. App. 275, 11 P.(2d) 36; *People v. Oliver*, 102 Cal. App. 29, 282 P. 813; *People v. Claggett*, 130 Cal. App. 141, 19 P.(2d) 805; *Johnson v. Hulse*, 83 Cal. App. 111, 256 P. 551; *First National Bank of Calexico v. Thompson*, 212 Cal. 388, 298 P. 808; *Castle v. Acme Ice Cream Co.*, 101 Cal. App. 94, 281 P. 396; *Black v. Solano Co.*, 114 Cal. App. 170, 299 P. 843; *Rossi v. Jedlick*, 115 Cal. App. 230, 1 P.(2d) 1065; *Klombies v. Weeks Poultry Community*, 121 Cal. App. 175, 8 P.(2d) 940; *Herkner v. Rubin*, 126 Cal. App. 677, 14 P.(2d) 1043, 1044; *Harlie R. Norris Co., Ltd., v. Lovett*, 123 Cal. App. 640, 12 P.(2d) 141; *Union Bank & Tr. Co. v. Joyner*, 40 Ariz. 229, 11 P.(2d) 829. Our courts have uniformly held that these conditions of section 25 must be complied with when such agreements are made, and that a

failure to conform to any of them invalidates the subscription. See cases, *supra*. In the case of *Herkner v. Rubin*, *supra*, the court says, 126 Cal. App. 677, at page 679, 14 P.(2d) 1043, 1044:

"Here the findings show a lapse of 143 days from the date of the subscription agreement to that of incorporation, and also that the articles of incorporation failed to recite the facts of defendant's subscription.

"It has been held that under such circumstances the statute becomes a part of the subscription agreement, and unless the conditions are complied with a subscription agreement is not enforceable. * * *

[4,5] Furthermore, section 25 grants permission to take subscription agreements in domestic corporations only. No permission or right to take such subscriptions to the stock of foreign corporations is pleaded, nor is any given by statute, and such preorganization subscriptions are void, *Olds v. Simmons*, *supra*; *People v. Oliver*, *supra*; and there is nothing unconstitutional in the right of the Legislature, as appellant contends, to regulate the sale of securities of a foreign corporation in this state, *Gillis v. Pan American Western Petroleum Co.* (Cal. Sup.) 44 P.(2d) 311.

[6,7] The complaint affirmatively shows that the incorporation of either corporation did not take place for more than 90 days after the subscription of the respondent. It was incumbent on the pleader to affirmatively plead the incorporation within 90 days. *San Francisco Savings Union v. Reclamation District*, 144 Cal. 639, 645, 79 P. 374; *Thompson v. San Francisco Gas, etc., Co.*, 20 Cal. App. 142, 128 P. 347. The complaint fails to plead that the subscription of respondent was listed in the articles of incorporation. Therefore it will be presumed that respondent Lee's subscription was not, nor were those of any of the other preorganization subscribers, set forth in the articles of incorporation. These elements are required and must be pleaded. *Rossi v. Jedlick*, *supra*, 115 Cal. App. 230, pages 234, 235, 1 P.(2d) 1065.

[8] The pleadings affirmatively show that the permit was not issued to either corporation, as distinguished from the original committee mentioned in the agreement, until August 6, 1930. The date of the agreement was January 15, 1929, and of respondent Lee's subscription July, 1929. On the facts as pleaded, this was too long a delay. *Herkner v. Rubin*, 126 Cal. App. 677, 14 P.(2d)

1043; *Rossi v. Jedlick*, supra; *First National Bank of Calxico v. Thompson*, supra.

The agreement provides for the issuance and sale of securities either by the companies to be formed, since a preorganization subscription is a security (Corporate Securities Act, § 3 and § 12), or by the management committee which it sets up. In either event, the securities so issued and sold are void for lack of compliance with the Corporate Securities Act. Under subdivision 3 of section 2, the word "company" is defined to include trustees, and subdivision 4 of the same section specifies "trust" as including all voluntary trusts, as the same are defined in the Civil Code. Civ. Code, § 2216 et seq. Section 2219, Civ. Code, provides: "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

A security is defined by paragraph (a), subdivision 7, of section 2, as follows: "(a) All shares or other interests or rights into which the capital, capital stock, or property of companies or rights of stockholders or members thereof are divided, including all treasury shares and shares of their own capital stock purchased or otherwise acquired by companies upon delinquent assessment sales or in any other lawful manner, and all certificates and other instruments issued by them or their authority evidencing or representing such shares, interests, or rights. * * *" This definition is further elaborated by paragraph (d) of the same subsection. Subdivision 9 of the same section 2 defines sales so as to include the transfer of "an interest in property * * * and also any issue of any security by a company." Section 3 of the act prohibits any company to "take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit. * * *" Section 25, already referred to, creates an exception to this requirement, but only on the conditions set forth in that section.

Section 12 of the act provides: "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the pro-

visions, if any, which it is required by the permit of the commissioner to contain, shall be void."

[9] It is settled that trustees named in a preorganization agreement with powers to organize a corporation and collect funds are trustees of an express trust. *West v. Crawford*, 80 Cal. 19, 21 P. 1123; *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784; *People v. Oliver*, 102 Cal. App. 29, 282 P. 813; *People v. Claggett*, 130 Cal. App. 141, 19 P.(2d) 805; *Boss v. Silent Drama Syndicate*, 82 Cal. App. 109, 255 P. 225; *Agnew v. Daugherty*, 189 Cal. 446, 209 P. 34; *Ex parte Girard*, 186 Cal. 718, 200 P. 593; *Barrett v. Gore*, 88 Cal. App. 372, 263 P. 564. In *West v. Crawford*, supra, 80 Cal. 19, pages 27, 31, 21 P. 1123, 1125, the court says: "* * * It amounts to a subscription to the stock of a corporation to be thereafter organized, and in addition it is an express promise to pay to the plaintiff in this action 20 per cent. of the amount of such subscription. * * * The parties mutually agreed with each other—that is, with those who signed the contract—to pay a certain sum of money to the plaintiff. He was thereby made a trustee of an express trust, and authorized to collect the money agreed to be paid. * * * The parties by their mutual agreement made the plaintiff their trustee, to collect and receive the money to be paid."

[10] In the case at bar we have all the elements of a company, defined as trust under subdivision 4 of section 2 of the act; of a security as it is defined in paragraphs (a) and (d) of subdivision 7 of section 2 and construed in *People v. Oliver*, supra; and a sale within the definition of subdivision 9 of section 2, since the contract in issue purported to sell units of stock at a price set forth in the contract. Under these circumstances, upon the acceptance by the committee of any of the subscriptions which the complaint clearly shows were taken prior to any permit being issued, there was a violation of the act squarely prohibited by section 3, declared void by section 12, and the issuers under sections 13 and 14 were guilty of a public offense and punishable by fine or imprisonment.

There is no allegation in the complaint that indicates that any of these subscriptions were taken after the permit which was originally issued to the committee mentioned in the preorganization subscription agreement. To the contrary, the language of the complaint with respect to this originally issued

permit shows clearly that all it purported to do was to authorize the committee to negotiate for, offer for sale, and take subscriptions from and after December 19, 1929. It seems obvious that, if the organization committee needed a permit to negotiate for, offer for sale, and take subscriptions after December 19, 1929, they needed a permit to take the subscriptions which included that of respondent Lee, and which they gathered between January 15, 1929, and December 19, 1929.

[11] Further, it appears from the complaint in question that no permit of any kind was issued to either corporation until August 6, 1930, and that the holding company was organized October 4, 1929, and the operating company on January 13, 1930, and that the subscriptions, including that of respondent, were accepted by both companies before either had a permit, as required by section 3 of the Corporate Securities Act. Such acceptance without a permit was clearly void. Section 12, Corporate Securities Act; *Reno v. Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784; *Tattersson v. Kehrlein*, 88 Cal. App. 34, 263 P. 285; *Commercial Bldg. Co. v. Levy*, 108 Cal. App. 54, 290 P. 1048.

[12] It is settled that the provisions of the Corporate Securities Act in force at the time the contract was made became a part of the contract, and that compliance with the terms of the act, as well as with the written provisions of the contract, must be pleaded. *Napa Valley Electric Co. v. Calistoga Electric Co.*, 38 Cal. App. 477, 176 P. 699; *Burki v. Pleasanton School District*, 18 Cal. App. 493, 123 P. 546; *Harlie R. Norris Co., Ltd., v. Lovett*, 123 Cal. App. 640, 12 P.(2d) 141; Civ. Code, § 1439; *Willcox v. Edwards*, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; *In re Estate of Whiting*, 110 Cal. App. 399, 294 P. 502; *In re Estate of Frees*, 187 Cal. 150, 201 P. 112.

[13] A failure to plead compliance with the law, as well as with the written provisions of the contract, renders the complaint subject to, and vulnerable against, demurrer. *Di Fiore v. Bohnett*, 54 Cal. App. 88, 201 P. 145; *Gibson v. Hercules Mfg., etc., Co., Inc.*, 80 Cal. App. 689, 702, 252 P. 780.

An analysis of the original complaint and the proposed amended complaint discloses further that the plaintiff not only has failed to plead compliance with the law, but, in addition, that neither com-

plaint pleads compliance with the written terms of the agreement itself.

[14] Nowhere in either complaint is it alleged that 10,000 shares of the common stock of the operating company were issued to the Ritz Carlton Management Corporation, as provided in the subscription agreement, or that the subscription agreement was ever approved by the commissioner of corporations, or that the committee performed the agreement. In addition, there is a negative showing, but none the less binding upon the pleader, that the shares issued were on terms different from those in the subscription agreement. The allegation in this latter respect is that plaintiff tendered the shares to defendant Lee "subject, however, to and in accordance with the terms and conditions of such subscription agreement and said permit." The terms of the permit were not pleaded in either complaint, and, in face of a demurrer for uncertainty, the court has a right to assume, since no attempt was made to correct this evasive allegation, that, if the terms of the permit were set forth, they would be against the pleader. *Smith v. Buttner*, 90 Cal. 95, 27 P. 29; *Whittemore v. Davis*, 112 Cal. App. 702, 297 P. 640.

[15] In face of direct averments which are made showing failure to comply with the agreement, and the failure of appellant to clarify evasive allegations to which objections were made upon demurrer for uncertainty and ambiguity, appellant's general allegation of performance does not help its pleading. *McNulty v. New Richmond Land Co.*, 44 Cal. App. 744, 187 P. 97, and *California, etc., Ass'n v. Rindge L. & N. Co.*, 199 Cal. 168, 248 P. 658, 47 A. L. R. 904. In the latter case the court says in 199 Cal. 168, at page 179, 248 P. 658, 662, 47 A. L. R. 904: "'Where a plaintiff alleges performance of a contract on his part in general language, 'the general allegation will not save the complaint where, in addition, plaintiff sets out what he has actually done, and such facts fall short of due performance.'"

The second cause of action in the original complaint is subject to the same defects as the first, because it is obvious that the second cause of action is merely a restatement of the first in the form of a common count. It alleges an "amount due and unpaid under that certain agreement alleged in the first cause of action. * * *" The "agreement" alleged in the

second cause of action is obviously subject to the same objections as the agreement in the first cause of action.

[16] We believe that it has been satisfactorily shown that the agreement was one in which preorganization subscriptions were taken and that such subscriptions became invalid by reason of the failure of appellants to comply with the Corporate Securities Act, and that the original complaint did not state a cause of action on either of the causes of action which it pleaded.

We now proceed to the second point raised by appellant; i. e., was a new contract made between the parties under the doctrine of *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220, 221. In treating this question, we will also consider the sufficiency generally of the proposed amended complaint. This amended pleading which the court refused appellant permission to file alleged three causes of action. The first and third causes of action of the proposed amended complaint were mere restatements of the first and second causes of action of the original complaint, both of which, however, were and are subject to the defects which have already been pointed out. The second cause of action of the proposed amended complaint alleges substantially the same background as that alleged in the first cause of action of the original complaint, but, in addition, alleges that on or about February 1, 1930, and also immediately following the incorporation of the two companies, both companies did "adopt and accept the terms and conditions of said agreement as the terms and conditions of a new and binding agreement between them. * * *". Further, it is alleged that the parties to the agreement at no time contemplated that the stock would be issued or sold prior to the incorporation of the companies and the issuance of a permit therefor, and that no stock was issued or sold. A general allegation then follows, in which it is asserted that the Corporate Securities Act is in violation of the Constitution of the United States. Appellants undoubtedly mean to plead that, after a permit was issued to the companies, a call was made for payment on the subscribers, including respondent Lee, and that respondent Lee complied with such call by making a first or second payment, by virtue of which the parties by operation of law made a new agreement valid under the doctrine

announced in *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220, 221.

[17] It is worthy of note that appellants did not plead the facts suggested, contenting themselves with an allegation of a conclusion of law which tenders no issue. *Vanasek v. Pokorny*, 73 Cal. App. 312, 317, 238 P. 798; *Blackwood v. McCallum*, 187 Cal. 655, 659, 203 P. 758; *Davies v. Ramsdell*, 40 Cal. App. 424, 430, 181 P. 94; *Turner v. White*, 73 Cal. 299, 301, 13 P. 794. As already pointed out, it cannot be ascertained from the original or amended complaints when respondent Lee made his two payments, whether one was made at the time the subscription was taken; whether one or both were made after the issuance of a permit to the members of the management committee. Whether one or both were made after or before the issuance of a permit to the companies nowhere appears. All that is alleged in the proposed amended complaint is that on August 6, 1930, a supplemental permit was issued to the companies (supplemental, however, only in the sense that it was supplemental to the permit originally and first issued to the members of the management committee); and that "defendant has heretofore paid to plaintiffs or one of them or to said committee, on account of the instalments of said agreement the first two instalments amounting to the sum of \$5,032 and no more. * * *". It will be noted that this adds further uncertainty to the time of payment, since, as already pointed out, the original complaint alleges first payment "on or about May, 1931." It is of the very essence of the principle enunciated in *Moore v. Moffatt*, supra, that, assuming an illegal subscription in the first instance, payment be made or negotiations be had *after the issuance of a valid permit*. The evasive allegations of the proposed amended complaint furnish no clue on this important fact, but, because of the liberality which we feel trial courts should exercise in permitting amendments to complaints, we will treat the proposed amended complaint, assuming that the pleader could allege facts which would meet the requirements of the factual situation so far as payment and negotiation are concerned, as in *Moore v. Moffatt*.

[18, 19] It may be conceded as a general proposition that a litigant is entitled almost as a matter of right to amend a defective complaint at least once, and thus

be given an opportunity to properly state a cause of action, if one can be alleged. If, however, it is apparent from the facts which are alleged in the original complaint that no cause of action can be stated, and this situation is further verified by a proposed amended complaint which, in the teeth of general and special demurrers, fails to set out vital elements of a good cause of action, a trial court would be exercising an academic discretion on a worse than moot situation, if it did anything but sustain without leave and refuse to grant leave to amend. The sole remaining question, therefore, is whether the added cause of action in the proposed amended complaint added anything, either by stating a good cause of action or in suggesting that a good cause of action could be stated, even though, as it was presently framed, it did not state one. If the new cause of action did either of these things, permission should have been granted for its filing. If it did not, permission was properly refused. Since the new cause of action alleged in the proposed amended complaint is bottomed entirely upon the doctrine of the case of *Moore v. Moffatt*, supra, it may not be amiss to set out the facts and doctrine of that case. The suit there was brought by a trustee in bankruptcy "to recover, under the trust fund theory, the difference between the sums paid on a subscription agreement for stock in the corporation and the par value of said stock, irrespective of the terms of the agreement." Although it does not appear when the company was incorporated, it was stipulated that prior to incorporation one Neeland and one Beggs entered into an agreement to purchase 96 shares of the capital stock of Admiral, etc., Company at \$25 per share, payable \$400 on January 1, 1915, and \$400 on the 1st of each and every month through to and including the 1st day of June, 1915. Upon payment of each \$400, 16 shares of stock were to be issued. The stock was thereafter paid for in accordance with the terms of said subscription, but was not issued at any time to Neeland and Beggs. The company was organized with an authorized capital stock of \$100,000, with shares of the par value of \$100 each. No permit authorizing any sale of stock by the company was issued until September 10, 1915, which permit was superseded by an amended permit issued and dated October 24, 1915. The amended permit authorized the issuance and sale of 600 shares

of preferred stock at \$30 per share. Thereafter, pursuant to the direction of the subscribers Neeland and Beggs given on December 1, 1915, the corporation on December 11, 1915, issued the 96 shares of stock paid for by Neeland and Beggs to one Warmington, who was, and was known by Neeland and Beggs to be, bankrupt. The corporation, from the time of its organization until its bankruptcy, was insolvent, and was known to be insolvent by the subscribers Neeland and Beggs. No demand was ever made for the unpaid purchase price nor was any assessment ever levied. The corporation went into bankruptcy April 6, 1916. The trustee in bankruptcy brought the action against the subscribers, who had paid less than \$100 a share, which was the par value of the stock, for the difference between what they had paid and par, including Neeland and Beggs, on the theory that a stockholder in fact cannot escape liability by having stock in an insolvent corporation transferred to a financially irresponsible person. *Moore v. Moffatt*, 188 Cal. 1, 5, 204 P. 220, 223. The subscribers took the position that they were not stockholders because, as the court in its opinion conceded, "the subscription agreement was in its inception void and incapable of acceptance by the corporation because executed, in contravention of the provisions of the Investment Company's Act (Stats. 1913, p. 715), prior to the procurement of a permit. * * * A nonsuit was granted in the lower court, which judgment of nonsuit was reversed. The doctrine which is apparently announced by the court, and upon which, as already pointed out, appellant here predicates an additional cause of action, is that, in spite of the invalidity of the original issue of stock by the corporation to the subscribers, there was a continuing offer from the subscribers to the corporation, and that, since a permit was subsequently issued to the corporation, pursuant to which stock was issued to the subscribers involved, a new contract was made between the subscribers and the corporation, as a result of a continuing offer to purchase which was accepted as of the date of the new permit issued to the corporation. The court said (188 P. 1, page 6, 204 P. 220, 223): "The agreement, so considered, and having been in fact ultimately accepted by the corporation after the required permit had been procured—as evidenced by the issue of the stock upon the order of the defendants—the

validity of its making and acceptance must be measured and tested by its character as revealed by the circumstances and conduct of the parties with relation thereto at the time of its ultimate acceptance rather than by the circumstances attending its mere physical making in the first instance."

[20] In the Moffatt Case, the subscribers, after the issuance of a valid permit, directed the corporation, and the corporation pursuant to such direction issued certificates of stock of the par value of \$100 per share upon which they had paid only \$25 per share. In the case at bar, there is no allegation that respondent did anything after a permit was issued to the corporation. Furthermore, it appears affirmatively in the second cause of action of the proposed amended complaint that "no shares of stock whatsoever have been issued or delivered." It also appears, by reason of the evasive allegation in the proposed amended complaint, that respondent paid nothing after the issuance of the permit to the corporation in the instant case, as distinguished from the members of the management committee, but, on the contrary, denied that he was liable in any amount or for any further payments.

There are other distinctions which could be pointed out, but, in view of the conclusion we have reached that the doctrine advanced by that case has no application here, irrespective of the distinctions alluded to save the essential one which is made by the Moore Case itself, we deem it unnecessary to make them.

An analysis of the case of Moore v. Moffatt, supra, and of the cases which have since followed, has convinced us that the doctrine of that case is, and is intended to be, an exception to the general rule, and applies only to those situations in which a representative of creditors is attempting to recover from parties to whom stock has been issued without full payment, or where the rights of innocent third parties intervene. It is apparent that neither of the exceptions mentioned is included in the situation here. At best the appellants in this case have such rights as were acquired by the organization committee and no others. Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 3 P.(2d) 557; Olds v. Simmons, supra; Herkner v. Rubin, 126 Cal. App. 677, 14 P.(2d) 1043; Honn v. Hamer, 81 Cal. App. 276, 253 P. 336; Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784. In the Reno

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Case, supra, the court says (72 Cal. App. 409, at page 413, 237 P. 784, 785): "The case of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, relied upon by appellant as contrary to the doctrine we have just announced, does not so impress us. That was not an action between the parties to a void contract, but an action by a trustee in bankruptcy of a corporation to recover the unpaid subscription price of stock for the benefit of creditors. *That situation presents an exception to the rule above announced*, which rule is suspended in the interests of innocent third persons who have relied upon the contract." (Italics ours.) In the Walker Case, supra, the court says, 214 Cal. 46, at page 48, 3 P. (2d) 557, 558: "No facts have been presented or offered which could bring this case within the exceptions noted in such cases as Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Domenigoni v. Imperial Live Stock Co., 189 Cal. 467, 209 P. 36; and Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, where rights of others than the parties to the void sale or contract were involved and the buyer had by his own conduct made himself answerable to the claims of such third parties. * * * The present action involves the rights only of the parties themselves. We conclude that the court did not err in rejecting the proffered testimony."

In Herkner v. Rubin, supra, the court says in 126 Cal. App. 677, at pages 680, 681, 14 P.(2d) 1043, 1044:

"Plaintiff concedes that the statutory requirements were not met, but contends that the agreement having been valid when executed, as was found by the trial court, and deliveries of merchandise pursuant thereto having been made after the company was incorporated, this was tantamount to an election to adopt its terms and conditions as those of a new subscription agreement, and that defendant is consequently liable. That such facts standing alone might have the effect claimed finds support in Moore v. Moffatt, 188 Cal. 1, 204 P. 220, where, notwithstanding a subscription agreement was executed previous to the procurement of a permit required by the Investment Companies' Act (St. 1913, p. 715), a valid permit was subsequently obtained, and pursuant thereto the stock was issued and accepted. * * *

"The stock was not issued in conformity with the permit; and where such is the case section 12 of the Corporate Securities Act declared the same to be void, and sec-

tion 13 of the same act (as amended by St. 1925, p. 970) that any company so issuing its stock would be guilty of a public offense.

"Where a statute prohibits or attaches a penalty to the doing of an act the act is void; * * * and this is true of an issuance of stock in violation of the permit granted by the corporation commissioner. * * * Moreover, the doctrines of estoppel by conduct and ratification have no application to a contract which violates an express mandate of the law (Pollak v. Staunton, 210 Cal. 656, 293 P. 26.)" See, also, *In re American Aluminum Products Co.* (D. C.) 15 F.(2d) 234; *Horn v. Abts* (C. C. A.) 19 F.(2d) 350; *In re Builders' Finance Ass'n, Inc.*, (D. C.) 26 F.(2d) 123; *Imperial Livestock Co. v. Tracy*, 208 Cal. 205, 281 P. 50; *Olds v. Simmons*, 123 Cal. App. 275, 11 P.(2d) 36.

[21] Appellants' point that the Corporate Securities Act is unconstitutional need not be treated any further than to say that the law does not sustain such contention. *In re Leach*, 215 Cal. 536, 12 P.(2d) 3; *People v. Eiseman*, 78 Cal. App. 223, 248 P. 716; *Ex parte Girard*, 186 Cal. 718, 200 P. 593; *Agnew v. Daugherty*, 189 Cal. 446, 209 P. 34; *Cecil B. De Mille Productions, Inc. v. Woolery* (C. C. A.) 61 F.(2d) 45.

[22] It has also been settled that upon facts such as in the case at bar the parties are not in *pari delicto*. *Tatterson v. Kehrein*, 88 Cal. App. 34, 263 P. 285; *Barrett v. Gore*, 88 Cal. App. 372, 263 P. 564; *Smith v. Bach*, 183 Cal. 259, 191 P. 14, and other cases heretofore cited.

[23] The good faith of the management committee is not questioned, but under the law actual good faith is of no import, if the law has not been complied with. *Boss v. Silent Drama Syndicate*, 82 Cal. App. 109, 115, 255 P. 225; *Commercial Bldg. Co. v. Levy*, 108 Cal. App. 54, 56, 290 P. 1048, as said in *Herkner v. Rubin*, 126 Cal. App. 677, 682, 14 P.(2d) 1043, 1045: "Irrespective of the integrity of the organizers or directors of a corporation, the law must be obeyed."

For the foregoing reasons, the judgment of dismissal entered upon the order sustaining the demurrer of defendant Lee without leave to amend is affirmed, and the appeal from the order refusing appellants permission to file an amended complaint is dismissed.

We concur: CONREY, P. J.; YORK, J.

LOS ANGELES TRANSFER CO. v. RITZ
CARLTON HOTEL CO. OF HOLLY-
WOOD, Limited, et al.

CALIFORNIA WESTERN HOLDING CO.,
Limited, et al. v. LOS ANGELES
TRANSFER CO.
Civ. 10193.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1935.

Hearing Denied by Supreme Court
July 23, 1935.

1. Licenses ⇨39

Subscriptions to stock of domestic corporation after its incorporation without permit authorizing issuance of stock first having been obtained and preorganization subscription to stock of foreign corporation without a permit held invalid.

2. Corporations ⇨76

In action on entire subscription for stock of domestic and foreign corporations, if subscriptions for stock of domestic corporation were proper and preorganization subscription for stock of foreign corporation improper, or vice versa, entire subscription was void (Civ. Code, § 1608).

3. Licenses ⇨39

As respects right to cancel stock which was not issued in accordance with permit, that subscription agreement recited that it was subject to approval of commissioner of corporations and that no money was actually paid to members of management committee of proposed corporations until after permit had been issued held immaterial, since every contract is subject to law, and mere fact that contract says what is presumed does not empower those who write contract to automatically license themselves to break law.

4. Licenses ⇨39

Under stock subscription agreement which was void in its inception because Corporate Securities Act was not complied with, parties were not in *pari delicto* and contract subsequently issued could not make agreement valid.

5. Licenses ⇨39

Subscriber under preorganization stock subscription agreement held entitled to cancel subscription, where permits issued by commissioner of corporations to corporations for issuance of stock did not provide, as required by agreement, that units of stock when issued should be deposited with trust company or banker to be held by management committee of proposed corporations as trustee for period not exceeding one year for purposes mentioned in agreement.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Actions by the Los Angeles Transfer Company against the Ritz Carlton Hotel Company of Hollywood, Limited, and others, and by the California Western Holding Company, Limited, and others against the Los Angeles Transfer Company, in which action defendant filed a cross-complaint. From a judgment and orders, the Los Angeles Transfer Company appeals.

Judgment and orders reversed, and actions remanded, with instructions.

Overton, Lyman & Plumb, of Los Angeles (William R. James, of Los Angeles, of counsel), for appellant.

Frank James and Everett H. Mills, both of Los Angeles, for respondents.

ROTH, Justice pro tem.

These cases were consolidated for the purposes of trial, and upon conclusion thereof a single set of findings of fact, conclusions of law, and a single judgment was entered; the judgment being against the Los Angeles Transfer Company in each case. Said company appeals from said judgment.

The general factual background of these cases is identical to that which is outlined in the case of California Western Holding Co. v. R. D. Merrill et al. (referred to herein as the Lee Case), 7 Cal. App. (2d) 131, 46 P.(2d) 175, decided this day by this court. The causes of action pleaded in these actions are predicated on the same preorganization agreement (hereinafter referred to as agreement) as set forth in the Lee Case. There are certain additions and variations of fact which are as follows:

In the cases at bar the transfer company made its subscription on the 25th day of November, 1929. The holding company, it will be remembered, was organized on October 14, 1929, and the operating company on January 13, 1930. On October 29, 1929, a permit was issued by the commissioner of corporations to the holding company authorizing it to issue seven shares of its capital stock, one to each of the seven organizers, who constituted the management committee, as set forth in the agreement. On December 19, 1929, a permit was issued to the members of the management committee, authorizing said members to take subscriptions for stock in the two companies from the per-

sons who were named in the application filed by the management committee for such permit and to collect from each of the parties so named 20 per cent. of the amount which each had agreed to pay. Through some error the transfer company which had signed the agreement "L. A. T. Co., By Edward D. Lyman," was not named in the application, Edward D. Lyman being named in its stead, and consequently was not named in the permit which was issued pursuant to the application, said Edward D. Lyman being named in its stead.

On November 26, 1929, transfer company paid to the members of the management committee 20 per cent. of its subscription, to wit, \$2,040. On February 17, 1930, resolutions were passed at several meetings of the boards of directors of the respective companies, accepting the various subscriptions of the various subscribers, including the subscription of the transfer company. On August 6, 1930, permit was issued to the operating company authorizing it to sell shares of its capital stock to the persons named in its application therefor, and authorizing the application of the moneys previously paid to the members of the management committee toward the purchase price. On the same day a permit of like tenor was issued to the holding company. The application for the respective permits did not nor did either permit set forth the name of the transfer company; the name of Edward D. Lyman having been erroneously substituted. On August 18, 1930, a second call for 20 per cent. was made on the various subscribers to the agreement, including the transfer company, which call was paid by the transfer company. On February 25, 1932, transfer company initiated one of the instant actions in which it was plaintiff and the companies and the several members of the management committee, defendants, to recover the money previously paid on its subscription and to have the subscription canceled and declared void. In March, 1932, the companies and the several members of the management committee instituted the other of the instant actions as plaintiffs against the transfer company, as defendant. In this latter action the transfer company answered and filed a cross-complaint, seeking in its cross-complaint the identical relief it prayed for in the first action, which it had instituted and filed as plaintiff.

In May, 1932, additional permits were issued to the companies, authorizing the

companies to make further calls for the balance of the subscriptions which had been made, and authorizing the companies to sell and issue shares of stock to the persons named in the application and in the amended applications upon which the last permits were issued. The amended applications contained corrected lists setting forth the subscribers to the stock, as set forth in the agreement, and contained the name of transfer company. The articles of either corporation did not set forth the subscription of the transfer company, nor did they set forth a copy of the agreement.

It has undoubtedly been noted that this case is distinguishable from the Lee Case in that the agreement here was signed after the incorporation of the holding company, the domestic corporation, but prior to the incorporation of the operating company, the Delaware corporation. At the time the subscription was taken, to wit, Nov. 25, 1929, the holding corporation had a permit to issue seven shares of stock, one each specifically to each of the members of the management committee. It had no permit to issue or sell any stock in addition thereto. As in the Lee Case, the subscription was for the stock of holding company and operating company to be issued in units as is more specifically set forth in the résumé of facts contained in the Lee Case. Unlike the Lee Case, the instant actions actually went to trial, and the specific facts as to the transaction between the parties here involved are more clear. The decisive legal questions, however, other than the question which arises by reason of the mistake in listing the name of Edward D. Lyman in lieu of transfer company, and failure to furnish appellant with a copy of the permit, are the same.

[1,2] The additional facts in the instant case make little difference in the application of the principles enunciated in the Lee Case. The facts here show that subscriptions were taken to the stock of the holding company after its incorporation without a permit authorizing the holding company to issue or sell such stock first having been obtained and that a preorganization subscription was taken for the stock of a foreign corporation without a permit. Under the law, neither subscription was valid, even though considered severally. In the instant case, however, the stock was sold in units, and the actions are upon the subscription as a whole and

not upon its several parts, conceding that it could be severed. Under such circumstances, if the subscription for the stock of the domestic corporation were proper and the preorganization subscription for the stock of the foreign corporation improper, or vice versa, the entire subscription is void. *First National Bank of Cal-exico v. Thompson*, 212 Cal. 388, 298 P. 808; *Tatterson v. Kehrlein*, 88 Cal. App. 34, 52, 263 P. 285; *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319; *Klombies v. Weeks Poultry Community, Inc.*, 121 Cal. App. 175, 8 P.(2d) 940; *Castle v. Acme Ice Cream Co.*, 101 Cal. App. 94, 99, 281 P. 396; Civ. Code, § 1608.

[3-5] The fact that the agreement recited that it was subject to the approval of the commissioner of corporations and that with reference to the transfer company herein involved the facts show that no money was actually paid to the members of the management committee until after the permit had been issued to them is of no assistance, because every contract is subject to the law, whether it says so or not. The mere fact that it says what is presumed does not empower those who write such a contract to thus automatically license themselves to break the law. The agreement being void in its inception, the parties were not in *pari delicto*, and a contract subsequently issued could not make it a valid agreement. Furthermore, in the instant case, since the permits were introduced in evidence, it affirmatively appears that such permits did not provide, as required by the agreement, that units when issued shall be deposited with Title Insurance & Trust Company or other trust company or banker to be held by the management committee as trustee to hold the same for a period not exceeding one year for the purposes mentioned in the agreement. Conceding, therefore, the validity of the subscription, the agreement upon which it was based was not complied with. This fact in itself is sufficient to predicate a cause of action in appellant. In view of what has been said, it becomes unnecessary to pass upon the fact of the mistake in names and the subsequent correction thereof by amended permit, or whether the failure of the companies to give copies of the permit to its subscribers, as required by the permit, was fatal.

Since there is no conflict in the evidence in this case, the finding of the trial court that the respondent companies complied

with the terms of the agreement, and the further finding to the effect that the permits issued by the commissioner of corporations authorized the sale to appellant, are not supported by the evidence. Such findings are hereby set aside, and in lieu thereof, this court finds that the respondent companies did not, nor did either of them, comply with the terms of the agreement, and that said respondent companies were not, nor were either of said companies, empowered or authorized to sell stock to appellant. The conclusions of law are also modified so that appellant is entitled to judgment in the action of Los Angeles Transfer Co. v. Ritz Carlton Hotel Company of Hollywood, Limited, et al., No. 335988, canceling its subscription agreement and declaring the same to be void and decreeing that appellant transfer company is entitled to recover from respondents the sum of \$4,080, together with interest at the rate of 7 per cent. per annum on the sum of \$2,040 from the 26th day of December, 1929, together with interest at the rate of 7 per cent. per annum on the sum of \$2,040 from the 18th day of August, 1930. The conclusions of law are further modified so that respondents, plaintiffs in the action of California Western Holding Company, Limited, et al. v. Los Angeles Transfer Company, No. 336190, take nothing against defendant therein, and that appellant, defendant in said action, be awarded judgment on its cross-complaint.

The judgment and orders are accordingly reversed and the actions remanded to the trial court, with instructions to said court to grant judgment to appellant in accordance with the modified findings of fact and conclusions of law.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 389

MELVIN v. BERENDSEN et al.
Civ. 9184.

District Court of Appeal, First District,
Division 1, California.
June 5, 1935.

1. Contracts — 169

Circumstances known to all parties at time of execution of contract may be consid-

ered in determining meaning intended, and usually meaning should be interpreted most strongly against party who caused uncertainty to exist (Civ. Code, § 1654).

2. Appeal and error — 1008(3)

Where construction given to contract by trial court appeared to be consistent with true intent of parties, another interpretation would not be substituted on appeal, notwithstanding substituted interpretation seemed equally tenable.

3. Appeal and error — 971(3)

Witnesses — 267

Trial court has discretionary power over cross-examination, exercise of which will be reviewed on appeal only if such discretion has been abused.

4. Witnesses — 268(1)

In action on contract whereby contractor agreed to pay expenses of moving print shop, necessitated by improvement work, wherein printer testified that he removed from premises by reason of improvements, denying cross-examination of printer regarding his purchase of additional and larger printing presses and fact that new location was larger than old held not abuse of discretion, notwithstanding affirmative answers to such questions would have had some probative weight.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Horace W. Amphlett against John C. Berendsen and another, wherein, upon plaintiff's death, his executor, Bradford M. Melvin, was substituted. From a judgment for plaintiff, defendants appeal.

Affirmed.

Dunne & Dunne, of San Francisco, for appellants.

Abbott, Cannon, Appel & Dains, and Cyril Appel, all of San Francisco, for respondent.

PER CURIAM.

The above action was brought by Horace W. Amphlett, since deceased, as assignee of the Wisnon Company, a corporation, to recover from the defendants the sum of \$3,000 upon a contract executed by them. At the time of its execution Amphlett was a tenant of a certain building owned by the Wisnon Company, and defendant Berendsen was interested in a street-widening project along the street adjoining the building. It was understood that the work contemplated would require the taking of a portion of the

structure, and that as a result the total space therein theretofore occupied by Amphlett and two other tenants would be diminished. The agreement—in which the Wisnon Company was named as first party and defendant Berendsen as second party—provided as follows: “* * * The said second party agrees to pay to the first party the sum of three thousand (\$3,000.00) dollars lawful money of the United States upon the completion of said North B street extension work as and for a portion of the moving expenses of Horace W. Amphlett, Esq., or his assigns, of the San Mateo Times and Daily News Leader, in the event said Horace W. Amphlett, Esq., or his assigns, is moved to another location by reason of the doing of said public improvement work.” Defendant New York Indemnity Company for a valuable consideration promised that defendant Berendsen would perform his agreement, and became bound on that account to the Wisnon Company in a sum in excess of the above amount.

It was alleged, and the court found, that Amphlett was removed from the building “by reason of the doing of said improvement work”; that he incurred on that account expenses exceeding the sum of \$3,000, no part of which had been paid by defendants or either of them to him or his assignor. Judgment was entered accordingly, and defendants have appealed.

They denied that the removal was due to the improvement work, and contend that the finding thereon is unsupported; also that the trial court erroneously restricted the cross-examination of the plaintiff on that issue.

[1,2] The evidence shows that the portion of the building occupied by Amphlett was not directly damaged or physically disturbed by the improvement, but that the space therein occupied by adjoining tenants was disturbed; that it became necessary to rearrange the interior of the building, including the space occupied by the plaintiff, in order to provide accommodations for the other tenants, and that this necessarily dis-

turbed plaintiff's occupancy. Whether this was contemplated at the time the contract was made, and the provision in question was intended to meet the situation, was disputed. The record contains testimony from which an inference either way might be drawn. The circumstances known to all parties at the time of the execution of a contract may be taken into consideration in determining the meaning intended (*Stein v. Archibald*, 151 Cal. 220, 90 P. 536), and as a rule it should be interpreted most strongly against the party who caused any uncertainty to exist; such party being presumably the promisor (*Civ. Code*, § 1654.) The construction given the instrument by the trial court appears in the circumstances to be consistent with the true intent of the parties; and, where such is the case, another interpretation will not be substituted on appeal, even though it seems equally tenable. *Kautz v. Zurich, etc., Ins. Co.*, 212 Cal. 576, 300 P. 34.

[3,4] Amphlett testified that he removed from the premises by reason of the improvement. He was cross-examined at length on this issue. The court, however, sustained objections to questions regarding the purchase of additional and larger printing presses, the increase in his business—which was that of a printer and publisher—and the fact that the new location was larger than the old. While affirmative answers to these questions would have had some probative weight, nevertheless the trial court has discretionary power over cross-examination, the exercise of which will be reviewed on appeal only if such discretion has been abused. *Grimbley v. Harrold*, 125 Cal. 24, 57 P. 558, 73 Am. St. Rep. 19. We cannot say that such was the case here, or that as a reasonable probability the facts sought to be elicited would have affected the result. The conclusions of the trial court are supported by the evidence, and no error has been shown which would warrant a reversal of the judgment.

The judgment is affirmed.

7 Cal.App.2d 171

**VERNON v. TITLE GUARANTEE &
TRUST CO.**
Civ. 9853.

District Court of Appeal, Second District,
Division 2, California.

May 24, 1935.

Attorney and client — 104

Where attorney brought action against incompetent without serving guardian, and promptly entered default judgment and levied execution, notwithstanding agreement extending time to answer, and certain client purchased at execution sale and subsequently married attorney, who thereafter procured title policy as wife's agent, wife held charged with notice of matters of which attorney had notice, and hence failure of wife and attorney to disclose defects as required by policy precluded recovery thereon (Civ. Code, § 2332).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mildred Stanford Vernon, also known as Mildred Stanford, against the Title Guarantee & Trust Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Thos. B. Reed, of Los Angeles, for appellant.

Keogh, Cate & Colver, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Action on a policy of title insurance. It appears that in 1928 Otho S. Vernon, as attorney for one Mabel C. Noyes, brought an action for money against James Hamilton and secured a judgment by default upon which an execution was issued, and the property of Hamilton, the realty involved in the present action—stipulated to be worth \$6,000—was sold pursuant to the execution to appellant herein on March 6, 1929, for \$440, and a year later she received a deed to the property. Thereafter Vernon, as agent for appellant, who had become his wife in August, 1929, applied for and on March 20, 1930, secured a policy of title insurance on the real property, naming appellant as the insured under the name of "Mildred Stanford." It appears further that James Hamilton was during all of the time mentioned physically and mentally incompetent, and was so formally

declared and a guardian for him appointed by the superior court on January 10, 1929.

On April 10, 1930, an action, referred to in this opinion as the Dunning Case, was commenced by said guardian against Mabel C. Noyes, Otho S. Vernon and appellant herein to set aside the deed issued under the execution levied in the action first above mentioned. Though requested so to do, respondent title company, owing to the conditions which existed at the time the policy was written, declined to defend this action or to assume any liability resulting therefrom. On April 13, 1932, the superior court granted the relief prayed for, and in accordance with the decree plaintiff therein paid defendants therein \$492.80 and said defendants executed a grant deed to the plaintiff. The findings in the Dunning Case, which are conceded by counsel to be conclusive in the present action, included findings that Otho S. Vernon, as attorney for Mabel C. Noyes, had granted to defendants' counsel in the first action additional time in which to answer the complaint, but had nevertheless entered a judgment by default against said Hamilton upon the exact day when a default might have been entered had the time to answer not been extended; that said Vernon had personally served the summons and complaint upon Hamilton, who was then mentally and physically incompetent and who became hopelessly insane; that said Vernon did not have a guardian ad litem appointed for said Hamilton, nor did he ever serve the summons and complaint upon the general guardian who was appointed January 10, 1929, and that notwithstanding these matters said Vernon secured a judgment by default and levied upon the real property of Hamilton; that said Vernon was well aware of the incompetency of Hamilton and the appointment of his general guardian prior to the sale of the property under the execution; that the property was bought at the sale for \$440 by appellant, who was then a client of Vernon and later married him in August, 1929; that the reasonable value of said property was \$6,000, "and that as such client and wife of said Vernon the said Mildred Stanford [Vernon] was charged with the knowledge of said Vernon of this matter."

Respondent's title policy included the provision: "This company will not be liable to anyone for loss or damage by reason of defects, liens or incumbrances * * *

created or suffered by the insured, or known to the insured to exist at the date hereof and not disclosed in writing to the company." There is no claim that the insured made any disclosure of defects in her right to title.

While respondent title company had knowledge or constructive notice of the matters of record—the Noyes judgment, execution and sale to appellant, that the property was worth much more than the price for which it was sold, the guardianship of Hamilton, and his being declared incompetent after the judgment but before the sale—these matters did not create any defect in the title, nor did they form the basis of the Dunning judgment. But as to those matters which formed the basis of that judgment—the extension of time to answer granted defendant by Vernon and the entry of a default judgment without allowing to defendant the further time of the agreed extension, that the property was bought in by appellant, the client of Vernon, that no process was served on the guardian of Hamilton, and that under the facts as found in the Dunning Case appellant was charged with the knowledge of her attorney and husband, Vernon, "of this matter"—respondent had no knowledge or notice of any kind or character. Vernon, the agent and attorney as well as husband of appellant, knew all of these facts when he applied for the title policy. Appellant sent Vernon as her alter ego to secure the policy. As against appellant, the principal, she is deemed to have notice of those matters of which Vernon had notice and which he ought in good faith to have communicated to her. Civ. Code, § 2332; *Donald v. Beals*, 57 Cal. 399, 405; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160, 161, 165. Having sent Vernon, her agent and attorney, to the insurance company to secure a title policy (which, according to the testimony, would not have been issued had the facts as disclosed in the Dunning case been given to the company), appellant thereby authorized and directed Vernon to do those things necessary to consummate the insurance contract. The failure of Vernon to give notice of the defects, as well as the personal failure of appellant to give such notice to the title company, had the effect, under the policy condition above quoted, of relieving the insurer of any liability by reason of the matters known to appellant and her agent but

not made known to the insurer, which was, therefore, under no obligation to defend the Dunning action nor to pay the loss, if any, which appellant suffered when compelled under the Dunning judgment to return the realty upon being reimbursed in the amount paid by her therefor at the sale, with interest.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 561

PEOPLE v. TUFANO.

Cr. 2699.

District Court of Appeal, Second District,
Division 2, California.

June 13, 1935.

1. Assault and battery ☞92

Evidence held to support conviction for assault with deadly weapon.

2. Criminal law ☞913(1)

Where court inquired after verdict of guilty whether accused desired to make application for probation, and, at time of hearing, probation was refused and sentence imposed, accused was not entitled to new trial because of delay in imposing sentence (Pen. Code, § 1203).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Charles Tufano was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Paul Angelillo, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted by the court of assault with a deadly weapon and was sentenced to one year in the county jail. He appeals on the grounds of alleged insufficiency of the evidence and irregularities in the conduct of the trial court.

[1] Appellant was visiting at the home of the prosecuting witness and became

somewhat intoxicated. Following an altercation, he went to his home, secured a revolver, and returned to the home of the prosecuting witness and fired two shots at the latter. Appellant declared that the two shots fired were from blank cartridges, but all cartridges in the gun when found by the officers were loaded and were not "blanks." A hole in the house having the appearance of a bullet hole was found near the place where said witness had been standing when the shots were fired. The evidence supports the court's verdict.

[2] After the verdict was announced, the court inquired: "Do you desire to make application for probation so that the court may determine what punishment to give?" Defense counsel responded: "Yes, your honor." At the time of hearing probation was denied and the sentence above indicated was imposed. Appellant complains of the delay thus occasioned and declares he is entitled to a new trial. There is nothing in the provisions of section 1203 of the Penal Code which precludes the filing of a probation application even though by its terms probation may not be granted, as in the instant case. The inquiry was obviously advantageous to appellant since the penalty imposed was commitment to the county jail, which fixed the crime as a misdemeanor, in lieu of a penitentiary sentence.

The appeal is without merit. The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 555

JENNINGS v. DAY et al.
Civ. 9306.

District Court of Appeal, Second District,
Division 1, California.
June 13, 1935.

Rehearing Denied July 12, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Appeal and error ⇨880(2)

Where plaintiff recovered judgment against driver of one automobile alone involved in collision, driver of such automobile could not complain of finding that driver of other automobile involved was not negligent, since there is no right of contribution be-

tween two joint tort-feasors, and plaintiff was only party aggrieved by finding.

2. Negligence ⇨122(3)

Defendant pleading defense of contributory negligence has burden of proving, not only that plaintiff was negligent, but also that such negligence was proximate cause of injuries complained of.

3. Negligence ⇨136(25)

Whether negligent act was proximate cause of injury is usually question of fact to be determined from evidence.

4. Automobiles ⇨247

In automobile collision case, finding that plaintiff motorist was not contributorily negligent held authorized, where it was further found that no act of plaintiff contributed to or caused collision, even if plaintiff was driving at speed in excess of that fixed by statute (Gen. Laws 1931, Act 5128, § 113).

5. Appeal and error ⇨294(2)

Contention that decision of trial court was result of passion and prejudice should only be considered where such contention was made in trial court on motion for new trial supported by affidavits showing specific facts evidencing improper action of trial judge.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Mary J. Jennings against Charles Day and another. From the judgment, the named defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Paul H. Bruns, of Los Angeles, for respondent.

PER CURIAM.

The plaintiff in this action sued for personal injuries sustained in an automobile collision and recovered judgment against the defendant Day alone, the court finding that the defendant Davidson had not been negligent. The defendant Day appeals from the judgment upon the ground that the evidence is insufficient to sustain a judgment against him and, also, that the judgment was the result of passion and prejudice predicated upon evidence relating to but not determinative of his liability.

The accident happened on Imperial highway near El Segundo. The highway extended in an easterly and westerly direction, Playa Del Rey road intersecting it

from the north at a right angle. West of Playa Del Rey road the highway turned to the south. This highway was just wide enough for two cars to pass and was on a descending grade from several hundred feet east of Playa Del Rey road to and beyond the curve to the west. Plaintiff was traveling from east to west approaching Playa Del Rey road at a speed of eighteen to twenty miles per hour. She saw the defendant Day's automobile coming toward her at what she estimated to be fifty miles per hour. When this car was about opposite or slightly east of Playa Del Rey road and only a short distance from plaintiff's car, it suddenly stopped. The defendant Davidson was driving an automobile which was following that driven by the defendant Day, and when the latter stopped, in order to avoid a collision with this machine Davidson drove his automobile around it but into the path of the one driven by the plaintiff, which he had not seen approaching. The impact was between the plaintiff's car and that driven by the defendant Davidson, there being no collision between the automobile driven by the defendant Day and any other car. The negligence charged against the defendant Day is that he brought his car to a sudden stop without giving any signal.

[1] The first point made by the appellant is that the evidence is insufficient to justify the finding that the defendant Davidson was not negligent. Appellant admits that if the court found that Davidson was guilty of negligence this would not excuse Day. He contends, however, that the trial court obviously ignored the evidence and found Day solely liable for the accident and that appellant was, therefore, not afforded a fair and impartial trial. Appellant cannot complain of the action of the trial court in finding that Davidson was not negligent. There is no right of contribution between two joint tort-feasors and respondent is the only party aggrieved by the finding of the trial court. *Forsythe v. Los Angeles R. Co.*, 149 Cal. 569, 87 P. 24. The fact that the court found in favor of defendant Davidson does not indicate that Day did not have a fair trial.

[2-4] Appellant next challenges the finding of the trial court that plaintiff was not negligent upon the ground that the evidence

shows that she was operating her car at a speed in excess of that fixed by section 113 of the California Vehicle Act (*Deering's Gen. Laws*, 1931 Ed. Act 5128). A defendant pleading the defense of contributory negligence has the burden of proving not only that plaintiff was negligent, but also that such negligence was a proximate cause of the injuries complained of. Whether or not a negligent act was a proximate cause of injury is usually a question of fact to be determined by the court or jury from the evidence. Assuming that the plaintiff in this case was negligent in driving her car at a speed in excess of that fixed by statute, it does not follow as a matter of law that she would have escaped injury had she been traveling at a lesser speed. *Gett v. Pacific G. & E. Co.*, 192 Cal. 621, 221 P. 376. The finding of the trial court "that the plaintiff was not in any manner or at all contributorily negligent in connection with the said collision of automobiles" is not contrary to the evidence, for it would be a proper finding if the court determined that the plaintiff was guilty of negligence which did not proximately contribute to the happening of the accident. The further finding that no act of the plaintiff did "contribute to or cause, either directly or indirectly, the said collision" is also to be considered in this connection.

[5] The final point made by the appellant is that the evidence establishes that the decision of the trial court was the result of passion and prejudice. As supporting this contention, appellant asserts that certain evidence moved and influenced the trial court to find that he was negligent. If an appellate court were ever justified in considering such a point, it would only be where it was made in the court below on motion for a new trial, supported by affidavits showing specific facts evidencing the improper action of the trial judge. Nothing but the finding against the appellant and in favor of his codefendant is offered to support the charge that a fair trial was not had. On the other hand, there is sufficient evidence to support the finding of the trial court against the appellant, and if there is any foundation for the criticism of the trial judge's findings, it has not been shown here.

The judgment is affirmed.

**RICHARD LIVINGSTON, INC., v. BANK OF
AMERICA NAT. TRUST & SAVINGS
ASS'N.
Civ. 10182.**

District Court of Appeal, Second District,
Division 2, California.

June 12, 1935.

Rehearing Granted July 8, 1935.

1. Limitation of actions ⇨28(1)

Complaint, alleging corporate plaintiff's right to possession of funds represented by checks credited by defendant bank to account of plaintiff's bookkeeper, collection of such sum for plaintiff's use and bank's indebtedness to plaintiff in amount of check, without alleging conversion in terms, value of property when taken by bank and plaintiff's ownership of checks when bank received them, but averring that bank was expected to receive and collect them, stated cause of action in assumpsit for money had and received within two-year statute of limitations, not action in trover for conversion governed by three-year statute (Code Civ. Proc. § 338; § 339, subd. 1).

2. Pleading ⇨34(7)

Pleadings will be liberally construed to state cause of action plaintiff attempted to state, especially on appeal, but cannot be strained out of due proportion to defeat statute of limitations obviously applicable.

3. Banks and banking ⇨126

Bank, sued by corporate depositor for amount of rent checks wrongfully credited by bank to account of plaintiff's bookkeeper, held not entitled to credit for amount paid by bookkeeper for janitor services, repairs, and other small charges against plaintiff; such transactions not being part of bookkeeper's embezzlements, on which cause of action was founded.

4. Banks and banking ⇨126

Bank, crediting rent checks to account of corporate payee's bookkeeper, with knowledge that he had no authority to collect checks or deposit them to his account, held not absolved from liability to payee on ground that it received them under valid indorsement from person in lawful possession thereof in due course for value without notice of defect in his title.

5. Banks and banking ⇨154(2)

Doctrine of laches held inapplicable to action in assumpsit against bank for amount of checks wrongfully credited by defendant to account of payee's employee; time for action being fixed by statute of limitations (Code Civ. Proc. § 339, subd. 1).

6. Costs ⇨158

Reference ⇨8(1)

Appointment of referee to make accounting and taxation of costs thereof by court in depositor's action against bank for amount of checks wrongfully credited to account of plaintiff's employee, instead of plaintiff, held not abuse of discretion.

7. Costs ⇨158

Reference ⇨8(1)

Appointment of referee to make accounting and taxation of costs thereof are within trial court's sound discretion.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Richard Livingston, Inc., against the Bank of America National Trust & Savings Association and another. Judgment for plaintiff, and named defendant appeals.

Judgment reduced in amount and otherwise affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff against two defendants. The defendant Hyman, who has not appealed, was employed by the plaintiff as its clerk and bookkeeper. He had the authority to stamp the name of the plaintiff by use of a rubber stamp on the back of checks received for rentals and to deposit them to the account of the plaintiff in the defendant bank where the plaintiff had its account. During the course of his employment Hyman so indorsed many checks, but instead of depositing all of them to the credit of the plaintiff, he so indorsed forty-three of them and then persuaded the bank to credit them to his own account after indorsing on said checks with a rubber stamp the words, "R. T. Hyman, Agent." The trial court found the facts to be as alleged by the plaintiff, but it concluded further that the defendant bank was guilty of conversion and applied a three-year period of limitation in assessing the amount of the recovery.

[1] It is the first contention of the defendant bank that the plaintiff's cause of

action as pleaded was not one sounding in trover for conversion which would be governed by the three-year limitation of section 338 of the Code of Civil Procedure, but was an action in assumpsit for money had and received which is governed by the two-year limitation under subdivision 1 of section 339 of said Code. The pleadings are very voluminous, the complaint containing more than forty counts. It will be unnecessary to attempt to summarize the plaintiff's complaint. It will be sufficient to say that (1) the complaint abounds with such phrases as these: "That plaintiff became and was and ever since has been entitled to the possession of the funds represented thereby" (the checks), and that "said sum was collected for the use of plaintiff," and that "defendant bank became indebted to plaintiff in the sum specified in the check"; (2) there is no allegation in terms of conversion; (3) there is no allegation as to the value of the property when taken by the bank; (4) there is no allegation that the plaintiff was the owner of the checks at the time they were received by the bank; (5) there is the averment that the defendant bank was expected to receive and collect the checks. It is obvious from a reading of the complaint that it is not "an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property," using the language of said section 338. The constant reiteration as to each check that the plaintiff is entitled to the "funds represented thereby" is utterly hostile to an action sounding in conversion, because if plaintiff relies upon conversion it is entitled to damages and not to the proceeds. Neither may the affirmative allegations sounding in assumpsit, which we have mentioned above, be treated as surplusage. They are the essence of the plaintiff's action, and taken in connection with the absence of allegations essential to conversion they characterize the complaint unequivocally as one in assumpsit.

[2] The plaintiff relies upon the rule that pleadings are to be liberally construed with a view to promoting justice. Such is the rule; and pleadings will be liberally construed to state the cause of action plaintiff has attempted to state, especially on appeal; but this does not mean that the pleadings, and the facts as well, are to be strained out of all due proportion for the purpose of defeating a statute of limi-

tations which obviously applies to the plaintiff's cause of action. The two-year rather than the three-year limitation should have been applied by the trial court. This will reduce the plaintiff's judgment in the sum of \$5,269.66.

[3] The plaintiff's tenants often paid Hyman their rent in cash and Hyman should have deposited it to the account of the plaintiff. Instead he embezzled more than \$6,000 of these cash funds. It also appears that throughout the period of his employment he often paid for janitor services, repairs, and various other small charges against plaintiff by his personal checks. These payments amounted to \$1,997.65. After his defalcations were discovered, he produced his canceled checks for these amounts and claimed credit therefor, but the auditors in checking these items back against Hyman's books found that contemporaneously with a large number of these items he had reimbursed himself by withdrawals from the cash receipts, so that as a matter of fact the plaintiff received no benefit from these payments because equal amounts of cash were withdrawn from the cash account. The court, with the aid of the auditor's report, credited the bank with \$925.45 on these items, which sum represented all that plaintiff actually received above the simultaneous withdrawals of cash. These so-called petty cash transactions were no part of the embezzlements upon which plaintiff's cause was founded, but they were independent transactions. The plaintiff contended in the trial court that this credit of \$925.45 should have been applied on the cash defalcations for which the bank was not being sued; but the plaintiff has not appealed from the judgment. The bank contends that all these items amounting to the said \$1,997.65 should have been applied to its credit. We see no merit in the bank's contention.

[4] The next contention of the bank is that it is not liable on any of the checks for the reason that it received them "under a valid indorsement lawfully placed upon the checks from a person in lawful possession of them who was therefore a holder, and the defendant having given value in due course for the checks, without notice of any defect in the title of the person negotiating them." The weakness in the above contention lies in the fact that the bank did have notice of the defect in the title of the defendant Hyman. The court

found upon substantial evidence that the bank "well knew that defendant Hyman had not the authority to collect the proceeds of the checks or to have the same deposited to his personal account."

In this regard the plaintiff contends that "the representatives of the defendant bank deliberately ignored the universally acknowledged custom among bankers that checks indorsed with a rubber stamp are for deposit to the payee only, and that all banks are charged with the duty of requiring evidence of authority of persons indorsing checks payable to a corporation before payment of any such check other than for the account of the corporation itself." But it is not necessary for us to decide these matters.

[5-7] It is the final contention of the defendant bank that the plaintiff's recovery is barred by laches. It is sufficient to say that the doctrine of laches has no application under the facts of this case. The limit within which the plaintiff might bring its action against the defendant is fixed by the statute of limitations. Neither is there any merit to the defendant's contention that the trial court erred in appointing a referee to make an accounting and in taxing the costs thereof. Such matters are within the sound discretion of the trial court and this discretion was not abused.

The judgment is reduced in the sum of \$5,269.66 and otherwise it is affirmed. Each party to pay its own costs on appeal.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 539

MARR v. CLARK et al.
Civ. 5328.

District Court of Appeal, Third District,
California.

June 12, 1935.

Hearing Denied by Supreme Court
Aug. 9, 1935.

1. Mortgages ⇨504

Defendant in foreclosure action, which was brought to trial after mortgagee's death and in which judgment of foreclosure was rendered and order of sale was issued to

commissioner appointed to sell property, could not recover, in action against mortgagee's attorneys and commissioner, damages for money expended by her and value of her services in defending foreclosure action and value of small house which her neighbors planned to build for her on property foreclosed.

2. Continuance ⇨7

Denial of motion by plaintiff who appeared in person for continuance after defendants had filed answer held not abuse of discretion.

3. Mortgages ⇨504

In action by defendant in foreclosure action, which was brought to trial after mortgagee's death and in which judgment of foreclosure was rendered and order of sale was issued to commissioner appointed to sell property, against mortgagee's attorneys and commissioner for injunction restraining commissioner from selling property and for damages incurred in defending foreclosure action, whether judgment in foreclosure action was erroneous or void would not be considered where attorneys and commissioner admitted and court found that judgment was void.

4. Mortgages ⇨504

Defendant in foreclosure action, which was brought to trial after mortgagee's death and in which order of sale was issued to commissioner appointed to sell property and in which commissioner published notice of sale, held entitled to injunction restraining commissioner from selling property and issuing certificate of sale or deed to property, since order of sale and proceedings of commissioner were voidable, if not void.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Winifred F. Marr against Oliver O. Clark and others. From the judgment, the plaintiff appeals.

Affirmed as modified.

Winifred F. Marr, in pro. per.

Oliver O. Clark, of Los Angeles, for respondents.

RANKIN, Justice pro tem., delivered the opinion of the court.

It appears from the record before us that on December 2, 1928, there was pending in the superior court of Los Angeles county an action, No. 233765, in which one Donald K. McLeod was plaintiff and Winifred F. Marr, plaintiff and appellant in

this case, was defendant; that defendants and respondents Oliver O. Clark and Charles R. Nelson were acting as attorneys for said McLeod. The action brought by McLeod was one for the foreclosure of mortgage. McLeod died on December 2, 1928, and some months thereafter the defendants Clark and Nelson, continuing to act as attorney for McLeod and without knowledge of his death, brought the said McLeod action to trial and on September 28, 1929, secured a judgment against said Marr for the foreclosure of McLeod's mortgage, and appointing R. E. Allen commissioner to sell the mortgaged property. Within a few days after entry of judgment an order of sale was issued by the clerk of the court to R. E. Allen as such commissioner, which order of sale is referred to in plaintiff's pleadings as a writ of execution. Under this order of sale Allen, as such commissioner, published a notice of sale, but has never filed any report of the sale nor has any certificate of any such sale ever been recorded.

Appellant brought this action against Oliver O. Clark, Charles R. Nelson, and R. E. Allen, and prays for a decree quashing said order of sale, enjoining R. E. Allen, commissioner, from making any sale of the property or issuing any certificate of sale, or making or delivering any deed to the property, enjoining the other defendants and each of them from appearing in court or acting as attorneys for said McLeod in said action, and for damages.

[1] On motion to strike parts of the second amended complaint, the allegations of the complaint upon which the claim for damages was based was stricken by the court. Appellant complains of this ruling, although it is apparent that no cause of action for damages was stated. She claims as damages money expended by herself and the value of her services in defending the suit against her, she having appeared in person, and the value of a small house which her neighbors planned to build for her on the property foreclosed in the mortgage foreclosure suit. Such items are not recoverable as damages. The order to strike was not error.

[2-4] The respondents filed an answer admitting, by failure to deny, the material allegations of the complaint and raising as the only issue the good faith of respondents in prosecuting the McLeod action and proceeding with the sale of the property. The cause was regularly set for trial, and

on the trial date the appellant in person appeared and requested a continuance. Her motion for continuance was denied, and we find no error or abuse of discretion on the part of the trial court in denying a continuance. Plaintiff then left the courtroom. The court ordered the trial to proceed and the defendants offered evidence to the effect that said Oliver O. Clark and Charles R. Nelson acted as attorneys for defendant McLeod in good faith and without knowledge of the death of McLeod and the court thereupon ordered that the defendant Allen be enjoined from conducting any sale. Mr. Clark volunteered to prepare findings and judgment and did so prepare the papers. The plaintiff Marr made some objection to the sufficiency or proper form of the findings and apparently claimed, as she now claims on this appeal, that the judgment entered in the foreclosure action after the death of McLeod was erroneous but not void. It is unnecessary to determine this question for the reasons that respondents conceded that such judgment was void and of no effect and the court so found. Whether the judgment was merely erroneous and voidable or void upon its face, there is no doubt that the issuance of the order of sale and proceedings of the commissioner were void, or at least voidable in this action and plaintiff was entitled to the injunction prayed for as against R. E. Allen as commissioner, and this is the only relief to which she is entitled under any view of the situation as shown to exist by the record. The court having by its judgment granted the appellant all the relief to which she is entitled, she has no grounds for complaint. The judgment enjoining said R. E. Allen from further proceedings in the foreclosure suit is worded as follows: "That R. E. Allen, receiver, be and he is hereby enjoined from proceeding with any sale or taking any steps respecting thereto in said case #233-765."

The use of the word "receiver" is obviously an error. However, in order to make the judgment properly express the intent and purpose of the court issuing the same, the said clause should be modified by inserting the word "commissioner," in place of the word "receiver," and the judgment is to that extent hereby modified.

As so modified, the judgment is affirmed; respondents to recover costs on appeal.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

BOYAJIAN et al. v. BALIAN et al.
Civ. 10163.District Court of Appeal, Second District,
Division 2, California.

May 24, 1935.

As Amended on Denial of Rehearing
June 19, 1935.**Hearing Denied by Supreme Court**
July 23, 1935.**1. Appeal and error ⇨930(1)**

Reviewing court must view evidence on appeal in light most favorable to successful party in trial court.

2. Assault and battery ⇨15

In action for assault and battery, plaintiffs were not barred from recovery on ground they were trespassers on defendants' premises, where evidence showed plaintiffs, on being requested to leave, proceeded to do so and were beaten while in act of leaving, and where force used by defendants was more than reasonably necessary to remove plaintiffs from premises.

3. Assault and battery ⇨18

In action for assault and battery, judgment against female defendant *held* justified, where evidence showed that such defendant procured brothers, other defendants, to come to scene of action, that during assault and battery she directed other defendants in foreign language, and in feminine way aided and abetted assault.

4. Assault and battery ⇨43(5)

In action for assault and battery, defendants could not complain that instruction regarding exemplary damages was given, where complaint alleged plaintiffs were entitled to such damages, case was tried on theory such damages were in issue, and where it was undenied that defendants submitted instruction based on such issue.

5. Appeal and error ⇨1064(4)

Instruction that law allows witness to testify from writing made by himself or under his direction at time when fact occurred or immediately thereafter, but that such evidence must be received with caution, *held* not reversible error, although words "though he retain no recollection of particular facts" should have been inserted, where witness testified in many instances wholly from notes, had no recollection of facts, and notes themselves were basis of testimony (Code Civ. Proc. § 2047).

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Harry Boyajian and another against Sam Balian and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Abe Richman and Thos. L. Nair, both of Los Angeles, for appellants.

Carlos S. Hardy and Henry Davidian, both of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiffs in an action for damages for assault and battery and for exemplary damages. The plaintiffs had called at the apartment of the defendants and while there the defendants ordered the plaintiffs to leave the premises. They left the apartment and had reached as far as the landing outside (assuming as true the evidence of the plaintiffs) when they were attacked by the defendants and badly beaten up from the fists of the defendants.

[1, 2] It is the first contention of the defendants that the plaintiffs are barred from recovering a judgment against the defendants because plaintiffs were trespassers for the reason that the plaintiffs refused to leave on being requested so to do, and that thereupon the defendants evicted them, using no more force than necessary to accomplish their purpose. It is our duty upon appeal, of course, to view the evidence in the light most favorable to the successful party in the trial court. Viewing the evidence in this light, the plaintiffs were not trespassers. The plaintiffs, on being requested to leave, proceeded to do so and were beaten while in the act of leaving, and finally, the force used by the defendants was more than reasonably necessary to remove the plaintiffs from the premises. The least that can be said is that there was a substantial conflict in the evidence on each of the above points which the jury resolved in favor of the plaintiffs.

[3] The defendants' second contention is that there is no evidence whatsoever to justify a judgment against the defendant Sarah Balian. On the contrary, it is shown that she rushed down and got the other defendants, her brothers, to come to the scene of action, and that during the assault and battery she directed the other defendants in a foreign language, and that in a feminine way she aided and abetted in the assault.

[4] Defendants next contend that the court erred in giving an instruction with reference to exemplary damages. The complaint contained an allegation that by reason of the foregoing assault and battery the plaintiffs were entitled to exemplary damages. The case was tried in the superior court upon the theory that such damages

were in issue. The plaintiffs say in their brief, and it is undenied, that the defendants submitted instructions based upon such an issue. Under the circumstances, the defendants cannot be heard on appeal to say that the pleadings were not sufficient to warrant such an instruction.

[5] The defendants next complain of an instruction following section 2047 of the Code of Civil Procedure, to the effect that the law allows a witness to testify from a writing made by himself or under his direction at the time when the fact occurred or immediately thereafter, but that such evidence must be received with caution. It will be observed in the above language there should have been inserted between the words "thereafter" and "but" the phrase, "though he retain no recollection of the particular facts." It appears, however, from reading the transcript that the witness Thompson, whom all parties concede was referred to in the instruction, testified wholly from his notes in a large number of instances. He had no recollection regarding much of his testimony, and the use which he made of his notes was not to refresh his memory, but his notes were themselves the basis of his testimony. The instruction as given does not purport to cover the permission given by the main part of section 2047 of the Code of Civil Procedure "to refresh his (the witness') memory respecting a fact" with his own writing, et cetera. It refers only and uses almost the very wording of the last portion of the statute where it refers to the very opposite situation than "to refresh," to wit, when he cannot be refreshed. It confines its own application to testimony given "from a writing" and not given to refresh a memory. Even a casual reading of the transcript reveals the fact clearly as to when the witness was using his writing to refresh his memory and when he was testifying from his writing independently of recollection. This must have been even clearer to the jury. Under the circumstances, there was no error committed in this regard which would entitle the defendants to a reversal.

Finally, the defendants contend that the damages were excessive; but we find against the defendants on this point also.

Judgment affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

CHASE v. THOMAS et al. (PACIFIC EMPLOYERS INS. CO., Intervener).

Civ. 9225.

District Court of Appeal, Second District,
Division 1, California.

June 7, 1935.

Hearing Denied by Supreme Court
Aug. 5, 1935.

1. Automobiles ⇨244(35)

Evidence that driver of automobile was proceeding at approximately 30 miles an hour along narrow street lined by parked automobiles sustained finding of driver's negligence, in action for injuries to pedestrian.

2. Appeal and error ⇨989

Reviewing court, in order to find plaintiff guilty of negligence as matter of law, must, after giving plaintiff's testimony construction most favorable to him, find that conclusion that he acted as reasonably prudent man is precluded.

3. Automobiles ⇨217(6)

Conduct of pedestrian in stepping directly in front of automobile in place in street other than regular pedestrian crosswalk constitutes negligence per se (St. 1931, p. 2127, § 131½, subd. (c)).

4. Automobiles ⇨217(6)

Pedestrian, crossing street at place other than regular pedestrian crosswalk, who looked but failed to see approaching automobile and stepped in front thereof without yielding right of way, held guilty of contributory negligence as matter of law (St. 1931, p. 2127, § 131½, subd. (c)).

Appeal from Superior Court, Los Angeles County; Ellis A. Eagan, Judge.

Action by Ernest H. Chase against John M. Thomas, Jr., and another in which the Pacific Employers Insurance Company intervened. Judgment for plaintiff, and defendants appeal.

Reversed.

Young & Young, William K. Young, and Forrest E. Murray, all of Los Angeles, for appellants.

Harold N. Nuzum, of Santa Rosa, for respondent Chase.

F. Britton McConnell and W. H. Abrams, both of Los Angeles, for respondent Pacific Employers Ins. Co.

SHINN, Justice pro tem.

Plaintiff, a pedestrian, was struck by an automobile owned by defendant John M. Thomas, Jr., and driven by his daughter,

Eleanor Thomas. Judgment went against both defendants, from which they appeal. Plaintiff double parked his laundry truck headed east, on the south side of West Thirty-Sixth Place in the city of Los Angeles. This street is 36 feet wide from curb to curb, and cars were parked along the curblines on each side of the street. It appears from the evidence that plaintiff had gone to the rear of his truck, where he took out a laundry bag, closed the doors, and stepped further into the street toward the north. He testified that he was not more than a foot or 18 inches beyond the fender of his truck at the time he was struck by the automobile, which was traveling east.

[1] Upon this appeal defendants present argument upon two points; the first one being that the finding of negligence on the part of defendant Eleanor Thomas is entirely unsupported by evidence. This contention merits only brief consideration. It was in evidence that defendants' car was proceeding at a speed of approximately 30 miles per hour when it was within 10 feet of plaintiff, and that it was going approximately 25 miles per hour at the time of impact. The testimony also shows that defendants' car started to skid at a point about a car's length west of the rear end of plaintiff's truck, and that the skidmarks extended for a distance of 83 feet. The skidmarks indicated that more than one wheel was locked for a distance of 36 feet, and one wheel for the total distance of 83 feet. It was for the trial court to determine whether the driver of the car was negligent in maintaining a speed of 30 miles per hour, or such speed as would cause the car to travel 83 feet after the application of brakes with sufficient force to lock all or some of the wheels. When it is considered that the car was being driven along a narrow street, lined on each side by parked automobiles, we would say that the evidence not only supported the finding of negligence, but pointed not at all to any other conclusion.

Appellants' next point is that respondent was guilty of contributory negligence, in that he failed to use ordinary care at the time he stepped from behind his truck. Plaintiff testified that after he took the bag from the car he looked both ways, first one way, then the other; that there were other cars in the road and plenty of them came along, but that he did not see anything close; that when he first saw de-

fendants' car it was about 16 feet away from him, and that it struck him before he had time to get out of the way.

[2-4] We are asked to set aside the finding of the trial court and hold that plaintiff was guilty of negligence as a matter of law upon his own testimony. Before we can do this, we must place upon plaintiff's testimony the construction that tends most strongly toward establishing the absence of contributory negligence and upon the facts so shown find plaintiff's conduct so wanting in care as to preclude the conclusion that his acts were those of a man of reasonable prudence and caution. *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 475, 186 P. 631. Plaintiff's position at the time he stepped from behind his laundry truck was more than the width of two automobiles away from the south curb. Plaintiff testified that his truck was standing within one foot of the car south of it, but it does not appear how close that car was to the curb. It would appear, therefore, that the point where plaintiff was struck was upon the south half of the street and within a few feet of the center line thereof. His testimony does not definitely show whether he looked toward the west before he stepped out from behind the truck or while he was taking the step, or after he had taken it. In our view of the case, it makes little difference which was the fact. The truck was 200 feet east of the nearest intersecting street toward the west. The path taken by plaintiff was not a pedestrian crosswalk. At that point it was plaintiff's duty to yield the right of way to passing vehicles, under the provisions of subdivision (c), section 131½, California Vehicle Act (St. 1923, c. 266, p. 517, as added by St. 1931, c. 1026, p. 2127). Plaintiff had no right to assume that drivers of such vehicles would slow down in order to give way to him. He was under the positive duty, under the provisions of the statute, to yield the right of way to others. He violated this statutory provision. Instead of allowing the automobile to pass in front of him, he stepped directly in front of it. The driver of the car was afforded no opportunity to stop after plaintiff stepped into the way. These acts upon plaintiff's part, being a violation of the provisions of the statute in that plaintiff instead of yielding the right of way claimed it for himself, constituted negligence per se. 19 Cal. Jur. 632. Plaintiff's negligence did not result solely from his

failure to observe this statutory right of the defendant driver. He stepped from a place of safety into a position of danger without taking adequate precautions before so doing. He looked toward the west and, as he says, saw no cars close by. It is true that he stated generally that he did not have an unobstructed view, and that there were other cars passing along the street. This testimony, however, has no probative force. Where these other cars were or which way they were traveling plaintiff did not state. It clearly appears that nothing intervened between plaintiff and defendants' car. If there had been another automobile immediately in front of that of the defendants, plaintiff would have walked directly into it. The most that plaintiff can reasonably claim in his own favor is that he looked directly toward the defendants' car, with unobstructed vision, in broad daylight, and failed to see it, although it was but a short distance away from him. To look in such a fashion and fail to see what is in plain sight is to look without a reasonable degree of care, and if plaintiff's looking was done in such a negligent manner he may as well not have looked at all. He was not confused, nor was his attention diverted from the matter of ascertaining whether automobiles were approaching from the west. There was no reason why he could not have made careful observation of the street toward the west from a point of safety. Viewed either as a violation of defendant driver's statutory right of way or as the act of one who deliberately steps from a place of safety into a place of danger without giving heed to the possible consequences of his act, plaintiff's conduct was negligent. This negligence proximately contributed to the accident. Had he not violated the law or had he used ordinary care for his own safety, the accident would not have happened. His negligence therefore bars his recovery. *Moss v. H. R. Boynton Co.*, supra; *Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; *Brkljaca v. Ross*, 60 Cal. App. 431, 213 P. 290; *Ogden v. Lee*, 61 Cal. App. 493, 215 P. 122; *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031 (opinion of Supreme Court in denying a hearing); *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 241, 116 P. 513.

Judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

EDWARDS v. BODENHAMER.

Civ. 9848.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1935.

Hearing Denied by Supreme Court
July 30, 1935.

1. Automobiles ⇨181(1)

"Willful misconduct," rendering automobile driver liable for injury to guest, means intentional doing of something which should not be done or intentional failure to do something which should be done under circumstances disclosing express or implied knowledge that such injury will probably result (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Appeal and error ⇨930(1)

Appellate court must view evidence in light most favorable to party prevailing at trial.

3. Appeal and error ⇨1046(5)

Trial court's comment, while properly sustaining objection to admission of transcript of witness' testimony at former trial for impeachment purposes, that matter contained therein was not impeachment, *held* not prejudicial to party offering transcript in evidence.

4. Appeal and error ⇨201(2)

Claim of trial court's misconduct will not be considered on appeal, where matter was not called to his attention at time, unless harmful result could not be obviated by instruction.

5. Automobiles ⇨246(36)

Instruction as to duty of passenger in automobile generally to sit still and say nothing *held* proper in action for injuries to guest in automobile driven by defendant.

6. Trial ⇨118

Permitting attorney for plaintiff to read to jury section of city ordinance fixing penalty for violation thereof *held* not error, where entire ordinance was admitted in evidence by parties' stipulation.

7. Trial ⇨260(1)

Refusal of correct instructions fully covered by instructions given was not error.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Loise Edwards against Lee Bodenhamer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Sparling & Teel, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment against the defendant for damages arising out of an automobile collision in which the defendant was the driver and the plaintiff was a passenger, and in which the jury impliedly found the defendant guilty of willful misconduct.

[1, 2] It is the first contention of the defendant that the evidence was insufficient to sustain the implied finding of willful misconduct as such term is used in section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693). In the recent case of *Meek v. Fowler*, 45 P.(2d) 194, the Supreme Court says that said phrase has been variously defined in the many cases, and that the court would not attempt to reconcile the several definitions and applications given to it, and then adopted as a satisfactory definition the language taken from *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 25 P.(2d) 988, 990, as follows: "Willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." And also the following quotation from the case of *Howard v. Howard*, 132 Cal. App. 124, 22 P.(2d) 279, 281: "To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." * * * 'Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.'" We have carefully examined the record in the light of this definition of willful misconduct, and, viewing the evidence in the light most favorable to the party

which prevailed at the trial, which it is our duty to do, we are satisfied that there is sufficient evidence to show willful misconduct, and that the verdict of the jury and the judgment of the court to that effect should not be disturbed.

The defendant next contends that the court was guilty of misconduct in the trial of the case. The defendant sets forth the circumstances upon which he relies at great length. It is difficult for us to find anything in the record which would be conceived to be misconduct upon the part of the court. Certainly no prejudicial error was committed.

[3, 4] During the trial, the transcript of the testimony of one of the witnesses at a former trial was offered in evidence by the defendant for the purpose of impeaching the witness, and an objection was made by the plaintiff to its admission. It is the defendant's contention that the court committed error in making the statement, while ruling upon the objection, that the matter contained in the transcript was not impeachment. The objection to the admission of the proposed evidence was properly sustained, for the reason that the transcript did not in any way tend to impeach the witness, and no prejudice resulted to the defendant from the court's comment, which, in effect, was a statement of the court's reason for sustaining the objection. Furthermore, the matter was not called to the attention of the court at the time in order to give the court an opportunity to prevent by a proper instruction any prejudicial effect upon the jury. Under the circumstances, the claim of misconduct will not be considered on appeal, unless the conduct complained of was such that a harmful result could not be obviated by an instruction. *Ward v. DeMartini*, 108 Cal. App. 745, 292 P. 192, and cases cited.

[5] The defendant next complains of an instruction with regard to the duty of a passenger in an automobile generally to sit still and say nothing. This instruction as given followed in *hæc verba* the statement of the law as set forth in the case of *Dowd v. Atlas, etc., Co.*, 187 Cal. 523, at page 528, 202 P. 870. The same words have been quoted in the text of 1928 Supplement to California Jurisprudence, subject Automobiles, p. 309; also 3 California Jurisprudence, 853. There is no merit in this contention.

[6] It is next contended that the court erred in permitting the attorney for the plaintiff to read a section of the city ordinance setting forth the penalty for a viola-

tion thereof. The entire ordinance was admitted in evidence by stipulation of the parties, and there was no error in the court's ruling.

[7] It is finally contended that the court erred in refusing to give certain instructions requested by the defendant. We have examined the instructions and conclude that the contention is without merit. Where the requested instructions were not erroneous, they were fully covered by other instructions.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 362

KAUPKE v. LEMOORE CANAL & IRRIGATION CO.
Civ. 1387.

District Court of Appeal, Fourth District,
California.

June 3, 1935.

Associations — 20(1)

Action by treasurer of River Water Association to recover from defendant its unpaid proportionate share of expenses of operating association held properly maintained in county in which was located association's place of business, as against contention that action should have been maintained in county where defendant maintained its principal place of business, where administrative agreement of association provided that assessments should be payable to treasurer, and treasurer maintained office in county where action was brought (Const. art. 12, § 16).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Charles L. Kaupke, as treasurer of the Kings River Water Association, against the Lemoore Canal & Irrigation Company. From an order denying defendant's motion for change of venue, defendant appeals.

Affirmed.

H. Scott Jacobs, of Hanford, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, Justice.

This is an action by plaintiff as treasurer of the Kings River Water Association to recover from defendant its unpaid proportionate share of the expenses of operating the association. The action was commenced in Fresno county, and defendant moved that the place of trial be changed to Kings county in which is located its principal place of business. This motion was denied and this appeal followed.

The Kings River Water Association is an unincorporated association of nineteen corporations and irrigation districts engaged in the business of the distribution of irrigation water to farmers. The association has its origin in an "Administrative Agreement" and a "Water Right Indenture" which were executed by its members, including defendant in 1927. Its affairs are administered by a board of directors selected by its members. Chas. L. Kaupke is, and has been since the organization of the association, its secretary and treasurer.

The administrative agreement empowers the board of directors to annually estimate the cost of conducting the business of the association and to levy an assessment for these expenses as well as any indebtedness remaining from the operations of the previous year. The board also has power to levy special assessments. It is provided that each member shall pay a fixed fractional share of such assessments.

The agreement contains the following: "That it is expressly understood and agreed that when said Association through its Board of Directors, Secretary or Treasurer shall have made upon any of the parties hereto a demand or requisition for any money, according to the terms of this Agreement, and any such party shall have failed to pay the same within sixty (60) days from the date of such requisition or demand, to the Treasurer of said association, then and in that event the sum of money so specified in said demand or requisition shall be due and payable to said Treasurer from the party hereto upon which such demand or requisition shall have been made, and such Treasurer shall have the right in his own name to sue for and collect the same from said party hereto so in default, together with all costs of suit and such reasonable attorney's fees as such Treasurer may have incurred in such action."

It appears from the record that various assessments were levied by the board of directors during the years 1927 to 1934, inclusive. Defendant paid some of these assessments in full and others in part. This action was brought to collect an alleged balance of \$4,162.75, made up of assessments unpaid for more than sixty days after demand or requisition for the payment of each.

The first meeting of the board of directors of the association was held in the city of Fresno. At that meeting the office of the association was located in a building in the city of Fresno, where it has remained ever since. Plaintiff was then chosen the secretary and treasurer of the association and has had his office as such in the city of Fresno. No other offices were maintained by the association or plaintiff and all business of the association and plaintiff as its treasurer has been conducted in such office in Fresno.

It appears that all assessments were levied by the board of directors and that requisitions were regularly served by the treasurer requiring the members to pay their proportionate part of each assessment to the treasurer of the association.

It would seem established by the case of *Lakeside Ditch Co. v. Packwood Canal Co.*, 50 Cal. App. 296, 195 P. 284, that the instant case is a transitory action with its venue fixed by the provisions of section 16 of article 12 of the Constitution. That case would seem to establish the right of plaintiff to maintain the action in the superior court of the county of Fresno.

As we have seen, the administrative agreement provided that the unpaid assessments "shall be due and payable to said treasurer" of the association. The treasurer maintained his office in the city of Fresno in Fresno county and nowhere else. Section 16 of article 12 of the Constitution provides that "a corporation or association may be sued in the county where the contract * * * is to be performed." There can be no question from the language used in the administrative agreement that this instrument placed upon each member the obligation of paying its proportion of each assessment to the treasurer, who maintained his office in the city of Fresno in Fresno county. In *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 P. 855, 65 L. R. A. 90, it is said: "But, if the contract was to be performed in Yolo county, the action was rightly commenced

there, wherever it was made, and we think the place of performance was in Yolo county. The plaintiff is a banking corporation doing business at Woodland, the county seat of Yolo, and a promise to repay money advanced by it—no other place of payment being stipulated—must be deemed a promise to pay at its bank, the only place where it can be found. * * * In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed."

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



HEAP v. CITY OF LOS ANGELES et al.*
Clv. 8381.

District Court of Appeal, Second District,
Division 1, California.
June 10, 1935.

Hearing Granted by Supreme Court
Aug. 8, 1935.

1. Officers ⇐11
Jurisdiction of Civil Service Commission is limited.

2. Municipal corporations ⇐218(8)
Order of Civil Service Commission sustaining discharge of civil service employee in city bureau of engineering was "final order," and Commission was without jurisdiction to thereafter retry question and make different finding (St. 1925, p. 1067, § 112 (a).

[Ed. Note.—For other definitions of "Final Order," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandate by George A. Heap against the City of Los Angeles and others. From an adverse judgment, petitioner appeals.

Affirmed.

Leo V. Youngworth and J. Harold Decker, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Jer-

rell Babb, Deputy City Atty., all of Los Angeles, for respondents.

PER CURIAM.

Respondents' demurrer to appellant's petition for a writ of mandate was sustained without leave to amend, and the appeal is from the judgment subsequently entered against petitioner. The petition alleges that the appellant, a civil service employee in the bureau of engineering of respondent city, was discharged from his position, and that he thereupon made written application to the civil service commission for an investigation of the grounds for such discharge and hearing thereon. A certified copy of the findings of the commission, the statutory name of which is "Board of Civil Service Commissioners," is made a part of the petition. This shows that on November 13, 1931, "a motion was adopted rescinding the action of the Civil Service Commission on October 20, 1931, sustaining said discharge," and that a second motion was then adopted, finding that the grounds stated for the discharge of the appellant were not sustained and ordering him restored to duty. The only question presented on this appeal is whether or not the civil service commission, after having passed upon the question submitted to it, could thereafter vacate its findings and make another and contrary order. Respondent contends that when the commission acted on the matter it exhausted its jurisdiction, and that the subsequent resolution is void.

The charter of the respondent city provides that a discharged employee may file an application with the board of civil service commissioners for an investigation of the grounds for his discharge. It further provides: "If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person * * * to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive. * * *" Section 112 (a), St. 1925, pp. 1024, 1067.

[1,2] The jurisdiction of the commission is a special and limited one. *Petersen v. Civil Service Board*, 67 Cal. App. 70, 227 P. 238. The required procedure was followed, and the question of appellant's discharge was determined by the commission when it adopted the first resolution. Its action sustaining his discharge was "final and conclusive." *Krohn v. Board of Water & Power Commissioners*, 95 Cal. App. 289, 296, 272 P. 757. It had no jurisdiction to retry the question and make a different finding at a later time. The charter gives no such grant of power, and it may not be implied. "A civil service commission has no inherent power after entering a final order dismissing an officer from the service to entertain a motion for new trial or rehearing and review and set aside its prior order." 43 Cor. Jur. 682. See, also, *Cook v. Civil Service Commission*, 160 Cal. 598, 600, 117 P. 662.

The judgment is affirmed.



6 Cal.App.2d 476

ASSOCIATED INDEMNITY CORPORATION, Petitioner, v. **INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA**, James Cagle and Ernle Briscoe, Respondents.

Civ. 1397.

District Court of Appeal, Fourth District,
California.

June 3, 1935.

Certiorari to Industrial Accident Commission.

For former opinion, see 44 P.(2d) 582.

R. O. Purvis and Varnum Paul, both of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

PER CURIAM.

The opinion herein reported in 44 P.(2d) 582 is hereby modified by striking therefrom the following language appearing in the second paragraph of the opinion and beginning on line 28 of column 2, page 582:

STEVENSON et al. v. UNION OIL CO. OF CALIFORNIA.

RULISON v. SAME.

Civ. 8622, 8623.

District Court of Appeal, Second District,
Division 1, California.

May 28, 1935.

Rehearing Denied June 25, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

Negligence ⇨82

Experienced employees of oil company which had agreement with defendant oil company, in pursuance of which connection between pipe lines of both companies was being constructed, held precluded from recovery against defendant for injuries, sustained when valve which was to be under defendant's sole supervision broke and oil and gas sprayed over employees and became ignited, by employees' negligence in undertaking to inspect and test unfinished connection without direction or permission of defendant under dangerous conditions, such negligence being direct and proximate cause of employees' injuries.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Consolidated actions by Margareta Oden Stevenson and another, and by Douglas L. Rulison, against the Union Oil Company of California. Judgment for defendant rendered on an order of nonsuit, and plaintiffs appeal.

Affirmed.

T. L. Doherty and Don R. Lehman, both of Los Angeles, for appellants Stevenson.

Edward C. Mills and John W. Holler, both of Los Angeles (Charles L. Lewis, of Los Angeles, of counsel), for appellant Rulison.

Paul M. Gregg, L. A. Gibbons, Andrews & Andrews, and Mortimer A. Kline, all of Los Angeles, for respondent.

HOUSER, Justice.

Primarily, the instant appeals involve the correctness of an order made on the trial of two separate personal injury actions, which for the purpose of trial had been consolidated, and wherein the trial court granted an order of nonsuit, in pursuance of which a judgment was rendered in favor of the defendant.

As was developed on the trial of such consolidated actions, which were brought for the purpose of recovering separate

"A subsidiary company organized by the bank for the purpose of handling and operating a large number of farms which had been taken over by it" and substituting therefor the following: "A company with which the bank had a working agreement for the purpose of handling and operating a large number of farms which had been taken over by it."



7 Cal.App.2d 356

PEOPLE v. MORROW.

Cr. 1432.

District Court of Appeal, Third District,
California.

June 3, 1935.

Criminal law ⇨1182

Judgment in criminal case should be affirmed where appellant failed to file brief or enter appearance when case was called for hearing on oral argument (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Joe Morrow was convicted of manslaughter, and he appeals.

Affirmed.

Ben D. Frantz and R. C. Fleming, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of manslaughter, a felony.

The transcript on appeal was filed in this court April 2, 1935. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 3, 1935. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

judgments, the pertinent facts upon which each of the alleged causes of action depended were substantially as follows:

Immediately prior to the date when the accident occurred (the facts of which were the foundation of the action), in pursuance of an agreement entered into between the defendant and Texas Oil Company, the defendant had been engaged in the construction and the installation of a connection, or "cross over," between oil pipe lines that were owned and operated separately by the respective parties to such agreement. At the point where such projected "cross over" was in the course of construction, the distance between the two pipe lines was approximately three feet. In order that such work might be properly carried on, a pit, or "bell hole," five feet square and three feet deep, was dug at the proposed point of connection of the two pipe lines. In digging such pit, the removed earth was placed on the surface of the ground adjacent to and surrounding the pit, thus making a pile of earth from twelve inches to sixteen inches in height. On top of such piles of earth lighted kerosene lanterns that were constantly kept in good working condition were maintained at all times—day and night—during the time consumed in the construction of the connection between the two pipe lines. It was designed that the oil that might be transferred from one pipe line to the other by means of such "cross over" would be controlled by two separate valves, one intended to be under the sole supervision and management of each of the respective pipe line companies. Apparently, on the date when the accident occurred, the work of installing the "cross over" had nearly reached its completion; but as far as the evidence discloses, the defendant company had given no notice to Texas Oil Company with reference to such an assumed situation. The pit remained open; the removed earth was still on the surface of the ground immediately surrounding the pit; and the kerosene lanterns were still lighted and in full operation. In addition thereto, each of the two valves that controlled the "cross over" was sealed. In such circumstances, without any authority or direction therefor having been first obtained from the defendant company, and in the entire absence of its invitation, consent, or permission so to do, as well as of its complete lack of knowledge or notice of the intention in the premises of two employees of Texas Oil Company, named Stevenson and Rulison, such employees un-

dertook to "inspect" and to "test" such unfinished "cross over." And it was in the course of the progress of such inspection or test that the valve which, upon the completion of the "cross over," was intended to be under the supervision of the defendant company, broke and by reason of which oil and gas was sprayed over and upon each of said two employees of Texas Oil Company; which oil and gas immediately became ignited from the flame of the lighted kerosene lanterns and produced the injuries that became the basis for the actions in the lower court. The evidence produced by the respective plaintiffs established the additional facts that each of such employees was an able, fully qualified, and experienced man in the line of his work; that he was aware of and had realization of the dangers which, in the circumstances, were present in the task which he had undertaken to perform; but that, notwithstanding long experience on his part, and with full knowledge of possible or probable consequences, especially in consideration of the likelihood of the presence in the pit of quantities of inflammable gas which, as an incident thereto, might result from his "inspection" or "test," he failed to extinguish the lighted lanterns or to remove them to a safe distance, or at all, from the point of operation; that he observed the seals that had been placed upon each of the valves; that he broke one of them and thereupon opened such valve that connected with the broken seal, and proceeded to "inspect" and to "test" the said "cross over"; that in so doing the two employees waited in the immediate vicinity of the "cross over" for a space of approximately fifteen minutes for the purpose of permitting a pressure of oil to develop within said "cross over," which to their knowledge, within such space of fifteen minutes, rose from zero to 330 pounds per square inch inside the "cross over," and which sudden and severe strain or pressure within the "cross over" and valve resulted in the destruction or the breaking of the valve and the consequent injuries to the said employees as hereinbefore set forth.

From such facts, all of which having been produced in behalf of the said employees in the consolidated action before the trial court, it becomes apparent that without and in the absence of the acts and conduct of said employees, knowingly performed by them, and with their full realization of the import and significance of such acts and conduct as applied to a situation

fraught with immediate and great danger, the accident which produced the injuries of which complaint was made by the plaintiffs could not have occurred. The negligence of the two employees not only contributed to the happening of the accident, but in fact was its direct and proximate cause.

No other point is necessary of consideration by this court.

It is ordered that the judgment or order be, and it is, affirmed.

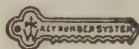
We concur: CONREY, P. J.; YORK, J.

On Petition for Rehearing.

PER CURIAM.

On consideration of the petition for rehearing herein, although it may be assumed that even if in some particulars, as insisted by petitioners, the description of the "cross-over" and the manner of its proposed operation, as set forth in the opinion of the court, is inaccurate, that fact neither indicates nor requires any change in the ultimate conclusion with reference to the essential facts in the case.

The petition for rehearing is denied.



7 Cal.App.2d 208

CUMMING v. AURIEMMA.

Clv. 9635.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1935.

Rehearing Denied June 25, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Pleading ⚡214(1)

Demurrer to amendment to answer admits facts set forth in amendment.

2. Pleading ⚡218(4)

Judgment in favor of defendant upon plaintiff's refusal to introduce his evidence after ruling on demurrer that defendant was entitled to judgment of dismissal *held* error, since there could be no trial on merits after such ruling on demurrer.

3. Appeal and error ⚡870(5)

While ruling on demurrer is not an appealable order, appeal from final judgment

brings before District Court of Appeal for review ruling of court on demurrer.

4. Master and servant ⚡354

That employee received compensation for his injuries, including injuries for which recovery was sought in malpractice action against physician, *held* not to divest trial court of jurisdiction over subject-matter of malpractice action (St. 1917, p. 831, as amended).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Howard A. Cumming against Pasquale R. Auriemma. From a judgment for the defendant, the plaintiff appeals.

Reversed.

Pelton & Warne, by Bernard E. Hill, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by plaintiff from a judgment in favor of the defendant, a physician, in an action for damages for malpractice. The plaintiff alleged in his complaint that his right eye was injured in an industrial accident; that upon direction of his employer he took treatment for his injury from the defendant; that the defendant was guilty of malpractice in his treatment of the plaintiff resulting in the loss of plaintiff's eye. The defendant, by way of answer, denied the allegations of the complaint and alleged contributory negligence. On the morning of the trial and after both sides had answered ready, the defendant filed an amendment to his answer in which he alleged as a second defense that the plaintiff, under and by virtue of the California Workmen's Compensation Act (St. 1917, p. 831, as amended), had applied for and received full workmen's compensation for his injuries and all the proximate consequences thereof including injuries for which recovery was being sought in this action, and that under the terms of that act the trial court was divested of jurisdiction over the subject-matter of the action. The defendant then suggested that plaintiff stipulate to the facts set up in the amendment and that the issue of law raised therein be presented to the court before proceeding further with the trial, and expressly stated that such procedure might save considerable time. To this the plain-

tiff consented, and the court excused the jury for the purpose of hearing argument. The argument lasted two days, and the court then indicated that it would rule in favor of the defendant that it was without jurisdiction over the subject-matter of the action and dismiss it, but it did not do so. Thereafter, the plaintiff by leave of court and stipulation of the defendant demurred generally to the said amendment to the answer. The court overruled the demurrer.

[1] It will be remembered that the facts set forth in the second defense were admitted. Under the circumstances, a trial court would have ordinarily entered a judgment of dismissal for lack of jurisdiction, but in this case the court requested plaintiff to proceed with his evidence or to rest his case. The plaintiff declined to introduce his evidence upon the ground then stated, that to try the issues of fact was useless procedure where the outcome of the case had already been decided by the court on an issue of law. The court thereupon ruled that plaintiff had rested and permitted an exception to the ruling. Thereupon, the defendant rested and moved the court to direct a verdict in his favor. This motion was granted. The verdict was returned and judgment was entered accordingly in favor of the defendant. The plaintiff's appeal is from this judgment.

[2] The court adopted an inconsistent attitude and made the inconsistent ruling that the trial must proceed on the merits even though its order declaring its lack of jurisdiction was still in effect. We are satisfied that for all practical purposes there could be no trial of the case on the merits after the court had already determined and continued to maintain by its ruling on the demurrer that the defendant was entitled to a judgment of dismissal. We are satisfied that plaintiff was not afforded a fair trial. The anomalous situation in which the plaintiff suddenly found himself left him confused as to how to proceed and resulted in a miscarriage of justice.

[3,4] While the ruling on the demurrer is not an appealable order, the appeal from the final judgment brings before this court for review the ruling of the court on the demurrer. The defendant does not even argue in this court the validity of his second defense or the lack of the court's jurisdiction over the subject-matter of the action or the correctness of the court's ruling

on the demurrer; and we do not have the benefit of defendant's research and learning in this regard. As the case must go back to the superior court for a retrial, it is our duty to determine the question, however, and our conclusion is that the defense of lack of jurisdiction was without merit, and that the general demurrer thereto should have been sustained. *Smith v. Golden State Hospital*, 111 Cal. App. 667, 296 P. 127; *Steiner v. Goodyear Tire, etc., Co.*, 115 Cal. App. 162, 300 P. 980.

Judgment reversed.

I concur: STEPHENS, P. J.



7 Cal.App.2d 643

WANTZ et al. v. AMMONS.

Clv. 9117.

District Court of Appeal, Second District,
Division 1, California.

June 17, 1935.

1. Automobiles ⇨244(36, 43)

In action arising out of automobile collision at confluence of two highways, evidence held to support findings that plaintiff motorist was free from negligence and that collision was proximately caused by defendant's negligence.

2. Automobiles ⇨246(58)

In action arising out of automobile collision at confluence of two highways, instruction on last clear chance doctrine held proper where under evidence defendant motorist by use of ordinary care had last clear chance to avoid collision.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Robert Wantz, a minor, by Christina L. Wantz, his guardian ad litem, and others against E. R. Ammons. From the judgment, the defendant appeals.

Affirmed.

Lee A. Solomon, of Los Angeles, for appellant.

Kiggins & Hoffman, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Respondent Wantz, at about midnight on May 27, 1932, was operating his automobile in a westerly direction on Foothill boulevard as he approached the confluence of San Bernardino road with Foothill boulevard. Foothill boulevard east of and up to the point of confluence runs in a generally easterly and westerly direction. Immediately prior to the point of actual contact between the two boulevards, Foothill boulevard commences to curve gradually to the northwest so that at the point of contact between the two roads Foothill is already bowed to the north, the northerly direction becoming more accentuated as one leaves the point of contact traveling from east to west, so that in continuing on Foothill boulevard after the point of contact has been reached one actually travels to the northwest. Except for the name, San Bernardino road is in reality a continuation in a direct westerly direction of Foothill boulevard, as one travels from east to west. The other respondents were passengers in the car driven by Wantz.

As Wantz approached the juncture of the two roads, he saw the car of defendant, Ammons, traveling on Foothill boulevard from the northwest to the southeast at a point approximately 500 feet from a viaduct or underpass (referred to in the evidence as a culvert), which was at a point approximately near where San Bernardino road joins Foothill boulevard and marks a spot near which the actual collision between the two automobiles took place. When appellant's automobile was at a point approximately 200 feet northwest of the viaduct, respondent Wantz concluded he was traveling between 40 and 45 miles per hour. At the time that Wantz saw appellant approximately 500 feet northwest of the viaduct, he (Wantz) was approximately 150 to 160 feet east of the culvert, traveling at between 20 and 25 miles per hour in a westerly direction on Foothill boulevard "approximately straddle of the north line of the center lane." As Wantz approached the point of contact of the two roads, he operated his car gradually to the left, continuing in that manner until within approximately 10 feet of the point of collision. With reference to what actually happened just prior to the collision, the testimony of Wantz was:

"Q. Notwithstanding that fact, and the fact that you were looking at it all the

time, as I understand, you did not swerve your car to the right? A. I did not.

"Q. Yes? A. Yes, when we were within ten feet of hitting each other I swerved. * * *

"Q. You did, when you were ten feet from the point of impact, swerve back toward the north for the first time; is that right? A. Yes.

"Q. All right. A. If I hadn't, I would have hit the culvert. There wouldn't have been room for both of us."

The undisputed evidence thereafter established that the collision took place off the surface of either highway, the actual impact being off the southerly edge and on the dirt shoulder contiguous to the southerly edge of San Bernardino road.

[1] Appellant analyzes the evidence extensively and in great detail in his brief, but it would serve no purpose to go into further detail here since from the foregoing facts, which are undisputed, aided as they were by conflicting evidence, the jurors had a right to conclude, as they evidently did, and the evidence substantiates the conclusion that Wantz reached the junction of the roads first; that he was justified in proceeding to the juncture thereof even though he saw the Ammons car approaching; that he actually was on San Bernardino road and had without question the right of way prior to the collision; that there was ample room to the right of Wantz for Ammons to pass (there being no testimony of other automobiles or vehicles on the road at or near the scene of the accident at the time thereof); that Ammons, if he had exercised any care at all, would have so altered the course of his automobile as to pass Wantz on the right; that Wantz had every reason to believe that he would be passed on the right; that Wantz was free from any negligence; and that the collision was proximately caused by the sole negligence of defendant, Ammons.

[2] The only other question of importance raised arises from the fact that the court gave an instruction on the doctrine of last clear chance. The context of this instruction is not criticized, but the fact that it was given at all is. From the conflicting evidence in the case, it could have been concluded that appellant, Ammons, and not respondent Wantz was first in the intersection of the two roads; that despite this fact respondent Wantz

negligently proceeded to operate his automobile west and to the left as he traveled on Foothill boulevard in an endeavor to reach the contact portion of San Bernardino road first; that in doing so, he approached the walls of the viaduct in the face of a vehicle coming from the opposite direction, thus locking his car in without any chance of escape by the use of ordinary care; and that appellant, Ammons, had ample time to see the situation and was, or should have been, aware of it, or that appellant realized, or ought to have realized, the inability of Wantz to escape from the same, and that by the use of ordinary care Ammons had a last clear chance to avoid the collision. Under such circumstances, an instruction on the doctrine of the last clear chance is proper. The conflicting evidence suggests room for the application of the doctrine of last clear chance and the question of whether it did apply depends upon what version of the evidence the jury believed, and the further question of whether the appellant "did or did not do all that he could reasonably have been expected to do to avoid the collision [was] solely for the jury's determination." *Lawrence v. Goodwill*, 44 Cal. App. 440, 450, 186 P. 781, 785; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 444

WELFARE INV. CO. v. STOWELL.
Civ. 9464.

District Court of Appeal, Second District,
Division 2, California.
May 23, 1935.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

On rehearing.

For prior opinion, see 44 P.(2d) 625.

Davis & Thorne, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

PER CURIAM.

The petition for rehearing is denied. The opinion, appearing in 44 P.(2d) 625, is, however, amended to read as follows:

The portion of the second paragraph, column 1, on page 627, reading as follows: "The Security-First National Bank carried separate ledger sheets upon which this note was charged against the makers and 'upon such sheets and upon the date of the Welfare acquisition of the note, these accounts were marked "paid in full"' is stricken and the following placed in lieu thereof: 'The Security-First National Bank carried separate ledger sheets upon which this note was charged against the makers and upon such sheets under the date of the Welfare acquisition of the note, these accounts were credited in the payment column.'"

Paragraph 5, column 2, page 627, reading: "The mere fact that the bank in its bookkeeping charged off the accounts of the note makers as being paid is no evidence against the makers themselves and it is wholly inconsistent, except as a bookkeeping convenience with all of the written facts of the transaction" is stricken from the opinion.



7 Cal.App.2d 568

BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES v. HURLBURT.

Civ. 1709.

District Court of Appeal, Fourth District,
California.

June 13, 1935.

1. Municipal corporations ☞455

Owner of certificate of title who had no actual notice of improvement assessment and bond covering it had constructive notice thereof under Street Opening Act (St. 1903, p. 381, § 20).

2. Municipal corporations ☞519(2)

Failure of city clerk to file notice of street improvement assessment with registrar held not to defeat assessment lien as against

purchaser without notice, since giving of notice by clerk is not mandatory, existence of lien is not dependent upon giving of notice, and entire matter of assessment is excluded and excepted from provisions of certificate of title to be issued (St. 1903, p. 376, as amended, and p. 381, § 20; Gen. Laws 1931, Act 8589, §§ 34, subd. 4, 94, 95, 98).

3. Municipal corporations ☞294(2)

Owner of certificate of title which did not disclose assessment lien had burden to make his own investigation as to existence of any tax or special assessment which had not culminated in sale of land at date of certificate, since provisions of act requiring city clerk to give notice of assessment to registrar are directory only (St. 1903, p. 376, as amended, and p. 381, § 20; Gen. Laws 1931, Act 8589, §§ 34, subd. 4, 94, 95, 98).

4. Municipal corporations ☞294(2)

Board of pension commissioners of city of Los Angeles held not precluded from asking that memorial of street improvement bond and assessment be made upon certificate of title which did not disclose assessment, on ground that board was agency of city and clerk who failed to give notice of assessment was also agent of city, and hence that board could not take advantage of its own wrong, where ownership of bond was immaterial; court's only concern being with effect of certificate of title which property owner received (St. 1903, p. 376, as amended, and p. 381, § 20; Gen. Laws 1931, Act 8589, §§ 34, subd. 4, 94, 95, 98).

Appeal from Suprior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Board of Pension Commissioners of the City of Los Angeles against Franklin P. Hurlburt. From a judgment for plaintiff, defendant appeals.

Affirmed.

Leland S. Bower and David R. Rubin, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff, on May 6, 1930, purchased a bond which had been issued by the city treasurer of the city of Los Angeles on February 21, 1930, covering a special assessment levied in connection with a street widening proceeding under the Street Opening Act of 1903 (St. 1903, p. 376, as amended). This bond represented

an assessment upon a parcel of land which had been brought under the Land Title Law (St. 1915, p. 1932; General Laws 1931, Act 8589) some time prior to April 23, 1926, and before the street proceedings in question were initiated. The defendant purchased this land, and on May 21, 1931, there was issued to him by the registrar of titles of Los Angeles county a certificate of title in accordance with the provisions of said Land Title Law. This certificate did not contain any memorial of or reference to the assessment or bond referred to, and it is conceded that the clerk of said city had never filed in the registrar's office a notice of the passage of any ordinance, resolution, or order in connection with said assessment.

The plaintiff brought this action under section 98 of the Land Title Law, asking that a memorial of said street improvement bond and assessment be made upon such certificate of title. In his answer, the defendant set up the failure of the clerk to comply with section 94 of the Land Title Law, and alleged that he had acquired the property for a valuable consideration and without notice of the assessment represented by said street improvement bond. The court found that the clerk had failed to file in the registrar's office the notice provided for in section 94 of the Land Title Act, and that the defendant had purchased the land without actual notice of this assessment, but gave judgment for the plaintiff, and this appeal followed.

The appellant maintains that the judgment is erroneous because the notice provision of section 94 is mandatory; that the failure of the clerk to give this notice removes any lien that might otherwise have accrued under the street widening proceeding and renders the assessment and this bond void and unenforceable as against him; that the decision of the court gave no effect to section 94 of the Land Title Act; that said section 94, being special in nature, must be held to be controlling over section 34 (subd. 4) of that act, which is general in nature; and that under section 95 of the act this assessment and bond could not affect his title, acquired before a memorial of the assessment was entered upon the register.

The effect and interpretation of sections 94 and 95 of the Land Title Act were considered in the case of Rutledge v. City

of Eureka, 195 Cal. 404, 234 P. 82, 90, and most of what was there said in connection therewith is applicable here. It was there held that the provision for a notice contained in section 94 of the act is directory and not mandatory, and that section 95 of the act does not refer to the notice or memorial provided for in section 94, but refers only to the memorial of statutory or other liens referred to in other sections of the act; the court saying: "A careful reading of the act discloses that section 95 applies only to the memorial of statutory or other liens elsewhere mentioned in the act and does not apply to the memorial of the passage of the resolution in question which could not create a lien on property, either registered under the Land Title Law or not so registered."

In that case the court further said: "It is provided in section 34 that—'the registered owner of any estate or interest in land brought under this act shall * * * hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except: * * * (4) Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.' None of the lands of the appellants has been sold to satisfy the assessment. The exception would indicate that even though a 'tax or special assessment' which had not proceeded to sale be not noted on the last certificate of title in the registrar's office, the registered owner would hold the land subject to such tax or special assessment."

In the case just referred to, a notice of the passage of the resolution, although not filed by the clerk within five days, as required by section 94, was filed before the recording of the assessment, although this was not done until after two mortgagees had acquired a lien on the premises. In the case now before us, the rights of a purchaser of the property are involved instead of the rights of a mortgagee, and the notice required to be given by the clerk under section 94 has never been given.

[1] While the appellant had no actual notice of the assessment and bond here in question, he had constructive notice under section 20 of the Street Opening Act of 1903 (St. 1903, p. 381); the regularity

of the proceeding leading to the assessment and bond not being questioned. Not only did the appellant have this constructive notice, but the law authorizing the certificate on which he relies, the Land Title Law, particularly informed him that such an assessment as this was not covered by the certificate. Under section 34 of that act certain things are particularly excepted as not covered by the certificate of title which is issued by the registrar's office, and the fourth of these exceptions covers any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

[2,3] The assessment here in question had not proceeded to a sale of the land, and, under the terms of the act, it was excepted from the matters covered by the certificate. Not only was this assessment thus excepted, but section 94 of the act does not contain any provision making the existence of such a lien dependent upon the giving of such a notice, a provision which is included in several other sections of the act involving liens which are not excepted from the coverage of the certificate. The giving of this notice by the clerk not being mandatory, the existence of the lien not being dependent upon the giving of the notice, and the entire matter of the assessment being carefully excluded and excepted from the provisions of the certificate of title to be issued, it cannot be held that a failure to file this notice defeats the lien or renders it void. Under the terms of the law authorizing the certificate he received, the burden was upon the appellant to make his own investigation as to the existence of any tax or special assessment which had not culminated in the sale of the land at the date of the certificate. While the filing of such a notice might have better called the matter to his attention, and while the Legislature might have added to section 94 a penalty similar in effect to that provided in other sections of the act, we are here concerned only with the section as it is and cannot read into it a provision and effect which is not there. Section 94 can only be given the effect to which it is entitled when read in connection with the rest of the act, which leads inevitably to the conclusion that its provisions are directory only. *Rutledge v. City of Eureka*, supra.

[4] The appellant contends that it would be inequitable to permit the respondent to

prevail in this action as against him, because the respondent is an agency of the city of Los Angeles, and the clerk who failed to give the notice was also an agent of that city, under the rule that no one can take advantage of his own wrong. The ownership of this bond, representing this assessment, is an immaterial matter, and we are here concerned only with the effect of the certificate of title which the appellant received. If, under the circumstances, it furnished no protection against such a lien, it matters not who happens to own the bond.

For the reasons given, the judgment is affirmed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.



7 Cal.App.2d 444
SWITZER et al. v. MULLALLY et al.
Civ. 9209.

District Court of Appeal, Second District,
Division 1, California.

June 7, 1935.

1. Stipulations ⇨18(6)

In action for death resulting from automobile collision, objection that written report of surgeon who performed autopsy upon body of deceased was hearsay *held* waived where parties stipulated that surgeon's report might be read into record, and report could serve no purpose other than as evidence.

2. Death ⇨76

In action for death resulting from automobile collision, death *held* not insufficiently shown to have resulted from injuries sustained in accident because no witness testified to extent of injuries, and sole evidence of cause of death was report by surgeon who performed autopsy, where deceased was in sound health before accident, was taken to hospital in helpless condition, and died soon afterward.

3. Appeal and error ⇨1008(1)

In action for guest's death when automobile in which guest was riding collided with another automobile at street intersection,

whether decedent was contributorily negligent *held* for trial court sitting without jury.

4. Appeal and error ⇨994(3), 1012(1)

Trial court, sitting without jury, was exclusive judge of credibility of witnesses and of effect to be given their testimony.

5. Appeal and error ⇨999(3), 1008(1)

Whether passenger in a vehicle has exercised ordinary care for his own safety is question of fact for trial judge or jury.

6. Appeal and error ⇨996

Unless facts proved establish negligence as only reasonable conclusion to be drawn therefrom, finding of trial court that there was no negligence is conclusive.

7. Death ⇨99(1)

\$5,895 for death of carpenter *held* not excessive where there was evidence as to earnings of deceased and as to support he furnished his family, and his ability to work and his expectancy of life were proven.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Emma A. Switzer and others against Don Hiram Mullally, Jr., a minor, Don Mullally, and others. From judgments for plaintiffs, named defendants appeal.

Affirmed.

Lon A. Brooks, of Los Angeles, for appellants.

R. Lee Heath, Loraine B. Rogers, and Mark A. Hall, all of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiffs bring this action as the heirs in law of Edward M. Switzer, deceased, to recover damages resulting from his death in an automobile collision. The case was tried by the court. Defendant Don Mullally, Jr., a minor, was sued as the operator of the car which collided with the car in which the decedent was riding as the guest of one Anna Marie Beck. Plaintiffs recovered judgment against Don Mullally, Jr., in the sum of \$5,895, and against Don Mullally in the sum of \$5,000, the latter being held liable as the signer of the application for the operator's license of his son, codefendant. Both defendants appealed from the judgment. The points urged for reversal necessitate a brief statement of the circumstances of the accident. The

deceased was a carpenter employed by Mrs. Beck; he was riding in her machine which she was driving westerly on Willoughby street in Los Angeles. Her car came into collision with that of the defendants in the intersection of Willoughby street and Cahuenga avenue, the car of the defendants having entered the intersection from the north. The two automobiles locked, struck the southwest curb of the intersection and separated. Mrs. Beck and the deceased were thrown out of their car; the deceased fell upon the curb or sidewalk at some distance from the car and he did not arise. He was shortly thereafter carried to the receiving hospital in an ambulance; the accident happened at 8:30 a. m. and Mr. Switzer died at 10:45 a. m. of the same day.

[1,2] Appellants address an extended argument to the point that the evidence did not disclose that death resulted from the injuries received by deceased in the accident. A written report of the surgeon who performed an autopsy upon the body of Mr. Switzer was read into evidence, under a stipulation that it might be so read to avoid the necessity of the personal appearance of the doctor in court. This report showed that the deceased received lacerations in the face and scalp, sustained four broken ribs and a fracture of the skull, which resulted in his death. Appellants now object that this written report was hearsay and incompetent and maintain that while they stipulated that it might be read into the record, they did not stipulate that it should be received in evidence. The objection is without merit. The report, as read, would serve no purpose other than as evidence in the case. The objection that it was hearsay was waived, and the report, under the circumstances, constituted satisfactory evidence as to the cause of death. Likewise without merit is the argument that death was not shown to have resulted from the injuries sustained in the accident. It is true that no witnesses testified to the extent of the injuries, the sole evidence thereof being furnished by the autopsy surgeon's report. The deceased was in sound health before he was thrown out of the car, was taken to a hospital in a helpless condition, and passed away soon afterward. Not only do the facts give rise to a reasonable inference that the accident was the cause of death, but any other conclusion would be quite unreasonable and illogical. *Robertson v. Weingart*, 91 Cal. App. 715, 267 P. 741.

[3-6] Appellants rely upon the defense of alleged contributory negligence of deceased. They depend upon the testimony of Mrs. Hickey, a pedestrian who witnessed the accident. This witness testified that from a point some 96 feet west of Cahuenga she witnessed the Beck car approaching from the east at a distance of 500 feet or more from where she was standing; that the car was traveling at about 40 miles per hour and this speed was maintained up to about the point of the accident; that at a distance of some 350 feet she observed the deceased and Mrs. Beck in conversation and saw the latter's lips moving; that the deceased was facing toward the south and leaning over with his right elbow upon his right leg. Upon these facts, appellants base their claim of contributory negligence on the part of the deceased. They insist that the uncontradicted evidence affirmatively shows deceased to have been negligent. The argument is based primarily upon the assumption that the court believed the testimony of Mrs. Hickey as to the speed of the Beck car. The court, however, was not obliged to accept the opinion of this witness upon the question of speed. While no other witness testified directly as to the speed of the Beck car, there was evidence of a statement made by defendant Don Mullally, Jr., to the effect that he observed the Beck car "nosing into the intersection" while he was 75 or 80 feet north of the intersection, and that he was traveling at 35 or 40 miles per hour. Inasmuch as the Beck car traveled only about 26 feet from the point where it entered the intersection to the point of impact, this admission of the defendant creates a conflict in the evidence as to the speed of the Beck car. We assume, therefore, that the court rejected the estimate of speed made by the witness, Mrs. Hickey. The arguments now presented on appeal, that the evidence shows contributory negligence on the part of the deceased, no doubt, were presented to the court and received due consideration. The conclusion to be drawn from the evidence upon the question of contributory negligence was one for the trial judge, who found, we think not improperly, that no negligence was shown. The trial court was the exclusive judge of the credibility of the witnesses and of the effect to be given to their testimony. *Davis v. Judson*, 159 Cal. 121, 113 P. 147; *Bohn v. Gruver*, 111 Cal. App. 386, 295 P. 891. Whether a passenger in a vehi-

cle has exercised ordinary care for his own safety is a question of fact for the trial judge or jury. *Shields v. King*, 207 Cal. 275, 277 P. 1043. Unless the facts proved establish negligence as the only reasonable conclusion to be drawn therefrom, the finding of the trial court that there was no negligence is conclusive. *Robertson v. Weingart*, supra.

Appellants, in their reply brief argue that a guest entering an automobile "assumes the risk of injury resulting from the driver's negligence, and this irrespective of what the circumstances may be." Since they concede that the cases hold otherwise, discussion of the point is unnecessary.

[7] The final argument is that the damages allowed are excessive. There was evidence before the court as to the earnings of deceased as a carpenter, and as to the support he furnished his family. His ability to work and his expectancy of life were proven. The most that can be said of the argument on this point is that, in appellants' view of the case, the judgments are large, but that is not a meritorious argument in support of a claim that the awards are excessive.

The judgments are affirmed.

We concur: CONREY, P. J.;
YORK, J.



KAYSSER v. McNAUGHTON et al. *
Civ. 9619.

District Court of Appeal, Second District,
Division 2, California.

June 12, 1935.

Hearing Granted by Supreme Court
Aug. 9, 1935.

1. Corporations ⇨217

During interim between repeal of constitutional provision relating to stockholders' liability for corporate debts and repeal of statute relating to same subject, statute could be invoked only to enforce causes of action which had accrued before repeal of constitutional provision, since stockholders' liability for corporate debts was imposed by Constitution, and statute merely prescribed means of enforcing such liability (Civ. Code, § 322; St. 1931, p. 444; Const. art. 12, § 3).

2. Corporations ⇨217

Stockholders held not liable for corporate debts contracted after repeal of constitutional provision relating to stockholders' liability, and before repeal of statute relating to same subject (Civ. Code, § 322; St. 1931, p. 444; Const. art. 12, § 3).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by G. Virginia Kaysser against Guy McNaughton and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Griffith & Thornburgh and Butcher & Haines, all of Santa Barbara, for appellant.

E. W. Squier and J. F. Goux, both of Santa Barbara, for respondents.

McCutchen, Olney, Mannon & Greene and Frank M. Gunter, all of Los Angeles, amici curiæ.

FRICKE, Justice pro tem.

Appeal from judgment following sustaining of demurrers without leave to amend.

[1,2] Appellant sued respondents upon their statutory liability as stockholders for corporate debts, moneys loaned the corporation by appellant's assignors subsequent to November 4, 1930, but prior to August 14, 1931. November 4, 1930, is the date of the repeal of section 3, article 12, of the State Constitution, providing for stockholders' liability for debts; August 14, 1931, is the date when section 322 of the Civil Code, relating to the same subject, ceased to exist by reason of its repeal by the Legislature (St. 1931, p. 444). This appeal involves the question as to whether respondents, as stockholders, were liable for corporate debts incurred between those two dates.

Section 3 of article 12 of the Constitution, as it read prior to its repeal, provided that, "Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder." Section 322 of the Civil Code uses the same phraseology in its initial paragraph, except that it employs the word "is" where the Constitution uses the words "shall be," and then continues with procedural provisions for enforcement of the liability. The effect of the employment of the words "shall be" in the repealed section 3 of article 12 was to make

of this constitutional provision a declaration of the law of this state applicable to the liability of stockholders; and the employment of the word "is" in the first paragraph of the now repealed section 322 of the Civil Code evidences the fact that this paragraph is merely a recital of the law as created by the provisions of section 3, article 12, and not the enactment of a statute creating a stockholders' liability which otherwise would not exist. The further provisions of section 322 provide for the method of applying and enforcing the stockholders' liability existing by virtue of the constitutional provision. When that constitutional provision was repealed on November 4, 1930, the liability of stockholders for debts thereafter contracted ceased, and section 322 remained merely as a recital of what had been the law and was operative only as a means of enforcing such causes of action for stockholders' liability which had already accrued.

Cases cited by appellant and which contain language to the effect that the statutory stockholders' liability was imposed by both the Constitution (art. 12, § 3) and the statute (section 322, Civ. Code) are not in conflict with the views here expressed. Those decisions did not involve the point now before us, and were in effect merely declarations that the law governing such liability and the manner of its enforcement was contained in the Constitution and statute. As stated in *Gardiner v. Bank of Napa*, 160 Cal. 577, at page 580, 117 P. 667, 668: "The constitutional provision fixes the liability, while the legislative enactment prescribes the manner of enforcing the rights of a creditor of the corporation as against a stockholder."

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



BROWN v. FERDON et al. *
Civ. 9784.

District Court of Appeal, Second District,
Division 1, California.
June 3, 1935.

Hearing Granted by Supreme Court
Aug. 1, 1935.

1. Evidence Ⓒ5(2)

In determining constitutionality of 1933 Code section precluding deficiency judgment

on trust deed or mortgage obligation unless notice of breach and election to sell was recorded one year before sale, which was limited to September 1, 1936, District Court of Appeal might take judicial notice of economic difficulties of times and hold section to be emergency legislation (Civ. Code, § 2924½, as added by St. 1933, p. 1674).

2. Constitutional law Ⓒ115

Economic necessity, while it may furnish reason for passage of law, will not place law beyond reach of constitutional guaranties concerning obligations of contract (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

3. Constitutional law Ⓒ115

Obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them, and impairment has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights, "obligation of a contract" being the law which binds parties to perform their agreement (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

[Ed. Note.—For other definitions of "Obligation of Contract," see Words & Phrases.]

4. Contracts Ⓒ167

State laws existing when contract is made, which affect parties' rights, enter into and become part of contract, and are as obligatory on all courts which assume to give remedy on such contracts as if they were referred to or incorporated in terms of contract.

5. Constitutional law Ⓒ169

Remedy, where it affects substantial rights, is included in terms "obligation of a contract," and remedy cannot be altered so as to materially impair such obligation (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

6. Constitutional law Ⓒ168

Right to proceed against debtor where security is inadequate cannot be taken from creditor without providing some equally effective remedy or imposing reasonable conditions for extension of time given (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

7. Constitutional law Ⓒ168

Mortgages Ⓒ559(2)

Statute precluding deficiency judgment on mortgage or trust deed obligation unless notice of breach and election to sell was recorded one year before sale, which purported to give relief to every debtor without imposing conditions in connection with his use and occupation of property, gave no opportunity for inquiring into situation of respective parties and provided no forum for creditor to

ⒸFor other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 712.

present situation from his standpoint, held invalid as impairing obligations of contract (Civ. Code, § 2924½, as added by St. 1933, p. 1674; Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

8. Constitutional law ☞ 168

Legislature may not, under pretense of regulating procedure or rules of evidence, deprive party of substantive right, such as a good cause of action, or an absolute or substantial defense which existed theretofore (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by A. G. Brown against James M. Ferdon and another. From a judgment for defendants on the pleadings, plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Preston & Files, Ralph E. Lewis, and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

This action was brought to recover the deficiency remaining unpaid upon a note originally secured by a deed of trust after sale of the property thereunder upon default in payment. The note and deed of trust were executed in 1930, and the sale was made after the effective date of section 2924½ of the Civil Code, passed in 1933 (St. 1933, p. 1674), which provides: "No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1935, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale." The trial court granted the defendants' motion for judgment on the pleadings, and the sole question presented on appeal is the con-

stitutionality of the quoted law as applying to instruments executed before its effective date.

If the law is to be applied retroactively, then the payee of a trust deed note must either waive his right to a deficiency judgment against the maker, or he must wait nine months longer than he was formerly required to do before the trustee may sell the property to satisfy the debt. It is contended by the appellant that if this law so applies, it impairs the obligations of contract within the meaning of the federal and state constitutional provisions prohibiting such legislation (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16). The contrary view urged by the respondents is that the law is emergency legislation justified by the economic situation through which the country has passed, and that its constitutionality is sustainable upon the authority of *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 237, 78 L. Ed. 413, 88 A. L. R. 1481, in which case the Supreme Court of the United States upheld the Minnesota Moratorium Law.

[1,2] While the law here challenged makes no reference to the necessity for its passage, in view of the fact that it is effective by its terms "to and until September 1, 1936," we may take judicial notice of the economic difficulties of the times and hold it to be emergency legislation. However, while economic necessity may furnish the reason for the passage of a law by the Legislature, that necessity will not place it beyond the reach of the constitutional guaranties concerning the obligations of contract.

[3] As was pointed out by Chief Justice Hughes in the *Blaisdell* Case, supra: "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, supra, 4 Wheat. [122] 197, 198, 4 L. Ed. 529 [549]) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights." He also said (290 U. S. 398, pages 429, 430, 54 S. Ct. 231, 237, 78 L. Ed. 413, 88 A. L. R. 1481): "The obligation of a contract is the law which binds the parties to perform their agreement. *Sturges v. Crowninshield*, 4 Wheat. [122] 197, 4 L. Ed. 529 [549]; *Story*, op. cit., §

1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.' *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550, 552, 18 L. Ed. 403 [408, 409]. See, also, *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357 [358]. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges v. Crowninshield*, supra, 4 Wheat. [122] 200, 4 L. Ed. 529 [550]. Said he: 'The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in *Von Hoffman v. City of Quincy*, supra, 4 Wall. [535] 553, 554, 18 L. Ed. 403 [409, 410], the general statement above quoted was limited by the further observation that 'it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired.'

Under the law existing at the time the note here sued upon was made, upon default the creditor could require the trustee to sell the property in satisfaction of the debt after three months' notice. He might then sue the maker of the note and obtain judgment for any deficiency remaining after crediting the proceeds of the sale upon the indebtedness. If the note comes within the provisions of the new law, the right to a deficiency judgment has either been entirely taken away from the creditor, or he must wait an additional period of nine months before he may have judgment. These are substantial rights which are either entirely abrogated or suspended, and the fact that this is accomplished by legislation which has to do with the

remedy rather than the substance of the contract is not controlling.

[4, 5] "It is settled that all the laws of a state existing at the time a contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract. *Von Hoffman v. City of Quincy*, 4 Wall. [535] 550, 18 L. Ed. 403; *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, 24 L. Ed. 858. The remedy, where it affects substantial rights, is included in the terms 'obligation of a contract,' and the remedy cannot be altered so as to materially impair such obligation. *Green v. Biddle*, 8 Wheat. [1] 75, 5 L. Ed. 547; *Edwards v. Kearzey*, 96 U. S. [595] 600, 24 L. Ed. 793. In the latter case it is said: 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest.' * * * In the late case of *Barnitz v. Beverly*, 163 U. S. 118, 16 S. Ct. 1042, 41 L. Ed. 93, the principle is fully discussed, and it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. The court, after citing many cases, said: 'It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract.' " *Welsh v. Cross*, 146 Cal. 621, 624, 628, 81 P. 229, 230, 106 Am. St. Rep. 63, 2 Ann. Cas. 905.

[6, 7] For these reasons the right of the creditor to proceed against his debtor where the security is inadequate cannot be taken from him without providing some equally effective remedy or imposing reasonable conditions for the extension of time given. The act in question does not

attempt to provide any substitute for the existing right. It either takes away the right to bring the action to judgment, or postpones that right for nine months. It is not, therefore, a statute of limitation, which fixes the latest time within which an action may be brought, and the law governing such statutes does not apply. And its provisions are substantially different in principle from those of the Minnesota Mortgage Moratorium Law.

The extension of time authorized under the Minnesota law does not automatically run in favor of every debtor, but may only be had upon conditions fixed by a court after judicial ascertainment of what is fair to both debtor and creditor under the conditions existing in each case and only where the debtor pays the rental value of the property as fixed by the court upon notice and hearing. The amount so paid is applicable to taxes and insurance, as well as interest upon the indebtedness. Also, the extended period allowed for redemption of the property may be changed by the court as circumstances change. In considering the constitutional basis for this law, the Supreme Court said in the Blaisdell Case, 290 U. S. 398, 440, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A. L. R. 1481: "Whatever doubt there may have been that the protective power of the state, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. *Block v. Hirsh*, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877; *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595."

This "temporary and conditional restraint," the court held, "in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions." Those conditions it found reasonable. "Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon

equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state's protective power, this legislation is clearly so reasonable as to be within the legislative competency." *Home Building & Loan Association v. Blaisdell*, supra, 290 U. S. 398, page 447, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A. L. R. 1481.

That the Minnesota law was sustained upon the sole ground that it extended the period of redemption upon reasonable conditions considerate of the rights of both debtor and creditor is evident from the latter case of *Worthen Co. v. Thomas*, 292 U. S. 426, 54 S. Ct. 816, 818, 78 L. Ed. 1344, 1347, 93 A. L. R. 173, where the Blaisdell decision was commented upon, as follows: "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the Blaisdell Case, we sustained the Minnesota Mortgage Moratorium Law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed."

While the act here being considered is limited in time, it fixes no conditions whatever for its operation. It purports to give relief to every debtor, irrespective of the amount of the indebtedness, the condition of the security, or his need for additional time. It imposes no condition upon the debtor in connection with the use and occupation of the property. It gives no opportunity for an inquiry into the situation

of the respective parties and provides no forum for the creditor to present the situation from his standpoint. It simply gives a debtor a preference without any consideration of the rights of the creditor, and it cannot be sustained under our Constitution. *Shouse v. Quinley* (Cal. Sup.) 37 P. (2d) 89.

[8] In a very recent case, *Morris v. Pacific Electric Ry. Co.*, 43 P.(2d) 276, 277, the Supreme Court said that "the Legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore. *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327."

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



7 Cal.App.2d 620

PEOPLE v. WEBER.

Cr. 2700.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

I. Conspiracy ⚡47

While mere association does not make a conspiracy, fact of conspiracy may be proved circumstantially by evidence of other facts and circumstances, when they are inconsistent with any other rational conclusion and when thus being inconsistent, it may be fairly inferred that conspiracy does in fact exist (Pen. Code, § 182).

2. Larceny ⚡62(2)

Evidence held to sustain conviction for petty theft on theory of larceny by trick and device (Pen. Code, §§ 484, 486-488).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Earl Weber was convicted of petty theft with prior conviction of a felony, and he appeals.

Affirmed.

Edith A. Faulkner and Donald Kolts, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

One Caywood, the complaining witness in this case, waiting in a bus station between 7 and 8 o'clock p. m. on December 4, 1934, met one Richards, who engaged him in conversation, as result of which Richards decided to accompany Caywood, who said he had an engagement to see "young ladies." While walking on Main street in the city of Los Angeles, from Sixth street south to Ninth street, the defendant Weber bumped into Richards and said he was a stranger and asked where Ninth street was. After he was directed, defendant told Richards he had just come down from Canada on a real estate deal, and that Americans were poor sports, whereupon they commenced matching pennies with dollars as the stake, all three walking together during the process. In paying his losses to Richards, defendant pulled out of his pocket a roll or "wad" of bills, which afterward proved to be or appeared to be Mexican currency wrapped in a \$1 bill of United States currency. Defendant then said that the complaining witness was a poor sport, suggesting that he get into a game. At one point during the walk, when defendant stopped to fix his shoe, Richards said to the complaining witness: "We might as well take him," and told the complaining witness he knew how defendant was matching and suggested that he hold tails. All three then engaged in a "game," which was about to reach a \$5 limit, when officers intervened and arrested defendant and Richards. During the two or three times which the parties matched before the arrest, Richards won the money on each occasion. Immediately before the physical seizure by officers of Richards and defendant, Richards stuck the money which he had won from Caywood, amounting to \$2.73 (all that Caywood had) into Caywood's pocket, from which the officers extracted it. Prior to the meeting between Richards and Caywood, the officers had been following Richards, the defendant, and some others since 6 o'clock of the same evening. They saw Richards go into the bus station, come out with Caywood and walk south on Main

street, and watched the pair as they were accosted by defendant, and then from a distance watched the game up to the point when the arrest was made. During all this time, the three engaged in the game were also followed by one Marlowe and one Tribeau, who had been seen with Richards and defendant by the officers prior to the time Caywood was picked up by Richards.

Defendant was charged with "petty theft with prior conviction of a felony." At the trial the prior conviction was both admitted and proved.

[1] The principal point urged by defendant is that the evidence is insufficient to prove the crime charged. Whether the evidence is sufficient obviously depends upon the collusion, if any, between Richards, who actually got Caywood's money, and the defendant. While mere association does not make a conspiracy, it is settled that the fact of conspiracy may be proved circumstantially by evidence of other facts and circumstances, when they are inconsistent with any other rational conclusion and when thus being inconsistent, it may be fairly inferred that a conspiracy does in fact exist. Pen. Code, § 182; *People v. Shurtleff*, 113 Cal. App. 739, 299 P. 92; *People v. Jones*, 136 Cal. App. 722, 29 P.(2d) 902; *People v. Brown*, 99 Cal. App. 117, 277 P. 908; *People v. Flanagan*, 65 Cal. App. 268, 223 P. 1014; *People v. Cory*, 26 Cal. App. 735, 148 P. 532.

[2] Upon the facts which we have briefly summarized, we have no difficulty in agreeing with the verdict of the jury that Richards and defendant were actually in a conspiracy to "take" Caywood. The fact that Caywood was willing to and did conspire with Richards to "take" defendant, does not help defendant any, as it is precisely by appealing to the cupidity of their victims that "artists" of defendant's type operate.

Defendant criticizes some of the instructions given. All his criticism, however, is based on the assumption that the evidence is insufficient to prove defendant guilty of any crime. Defendant says, in his brief: "We concede that the instructions given were fair had there been evidence to prove any crime." The evidence shows the fact of conspiracy on the part of the defendant, as we have already

pointed out, and establishes the crime of larceny by trick and device, now included in the theft statute. Pen. Code, §§ 484, 486, 487, 488; *People v. Edwards*, 133 Cal. App. 335, 340, 24 P.(2d) 183.

We find no error in any of the instructions or anywhere in the record. The reporter's transcript, on the contrary, demonstrates that the trial court was more than ordinarily liberal and indulgent with defendant, who insisted on defending himself.

Judgment and order affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 347

**BOUGHN v. LOS ANGELES CITY SCHOOL
DIST. OF LOS ANGELES COUNTY**

et al.

Civ. 9051.

District Court of Appeal, Second District,
Division 1, California.

June 3, 1935.

Schools and school districts ⇨89

Where 11 year old school girl, playing tag with other girls in school lavatory, contrary to regulations of which she had knowledge, struck water faucet extending three inches from wall and injured her leg, school district was not liable for injury, where evidence disclosed that faucet was not dangerous and that defendants were not negligent in other respects (St. 1923, p. 675, § 2).

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Suit by S. L. Boughn, guardian ad litem of Marian Boughn, a minor, and S. L. Boughn, individually, against Los Angeles City School District of Los Angeles County and others. From a judgment for plaintiff, defendants appeal.

Reversed and remanded, with directions.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and Beach Vasey, Deputies Co. Counsel, all of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Appellants, comprising the members of the board of education of the Los Angeles city school district of the county of Los Angeles, the superintendent of the district, and the district itself, a public corporation, appeal from the judgment rendered against them and in favor of respondent Marian Boughn, a minor of the age of eleven years, suing by her guardian ad litem, S. L. Boughn, her father. On June 18, 1931, while attending the Wilshire Crest School in the said city school district, the minor, contrary to the regulations of said school which she testified had been impressed upon her on a number of occasions and which she admits she knew, played tag in the girls' restroom located in one of the school buildings. In the course of the game she bumped into a pipe upon which a faucet was mounted, the pipe and faucet protruding from one of the walls approximately two and a half to three inches. The trial court found that "the said projecting water faucet was exposed without proper or any shields or guards thereon," and that appellants "negligently and carelessly maintained and operated the premises * * * and particularly the * * * girls' lavatory thereof, in a dangerous and defective manner. * * *" The evidence is conflicting as to whether the minor at the time of the accident was running, skipping, or walking. It is difficult, however, to visualize a game of tag being played at a walk. Further, it is difficult to understand how the minor could have suffered the cut or gash on the inside of her leg, which she suffered as a result of a collision with the faucet, and which the trial court found to be "one inch deep and 4 inches long," if she merely walked into the faucet. Irrespective of the conflict in the testimony on this phase of the case, however, it appears without contradiction that the minor did not look where she was going. She testified: "I was not running. I was looking back over my shoulder to see if I could see anybody back of me. I was going to tag them. While I was going with my head looking back over my shoulder, I ran into this faucet. No, I walked into it. I mean I bumped into it. No, I was not running then. I am sure of that now."

The minor also testified that she had attended Wilshire Crest School for a period of five years, and had for two years prior to the accident used the restroom or lavatory in question, and that she and the other pupils had been instructed how to use the lavatory. These instructions were to the effect that she was not to run in it or play games in it, but she and the other pupils were to go in the lavatory by one door designated as the means of entrance, and then proceed around by the windows, use the washbasins, and pass out by another door designated for that purpose.

We feel that it is unnecessary to discuss the question of whether or not the child was guilty of contributory negligence, since we are convinced that the court's finding of negligence on the part of defendants is not supported by the evidence. The most complete description of the faucet or pipe in question is that given by the child's father, who surveyed the premises immediately after the accident. His testimony is summarized in the bill of exceptions as follows: "It looks like the faucet, but hardly looks like the end of the faucet. I saw a faucet in the position appearing in that picture. Well, if there was any difference it was apparently that this—it looks like there has been a cap or something put on the end of that. I should say that this faucet extended about two and a half or three inches from the wall. Well, that part that the water comes out, evidently that extended out there about an inch and a half, and then there is this part from here is apparently about another inch or inch and a half. By 'this part' I refer to the part where the handle goes on. * * * Well, it was rather a square proposition that came out there; evidently so that the faucet would have another—the turning part would have another handle. That square was about as big around in reference to a common object such as a pen or pencil, as a pencil. Slightly smaller than the pencil that is now shown. * * * I would say about a quarter of an inch, yes."

The child in describing the object in question said: "The pipe was longer and sharper than it is in the picture. The end of the pipe was sharper. The end that stuck out was sharper. I don't remember whether the one that stuck down was any different. The one that stuck out, as

I remember now, stuck out still further and it was sharper, the end of it. I don't remember what the end looked like, as I saw it on the day of the accident, after I was hurt—in relation to any other object—how sharp it was. It looked sharper than the picture represents it.”

To hold that the maintenance of the faucet, as described, in a place such as a lavatory is negligence, is in fact to say that the only way that a school district could escape a charge of negligence predicated on facts such as in the case at bar would be by building a faucet of the type described in places such as a lavatory by recessing the same in the walls. It is clear from the facts detailed that, even if the faucet in the case here had a guard or shield, or both, the accident such as described here would have occurred. If the faucet had a guard or shield, the injury might have been more or less, depending on the nature of the guard or shield and the manner in which contact with the same occurred. We have been cited to no case which holds on similar or analogous facts that the maintenance of a faucet which protrudes from two and one-half to three inches from the wall is negligence, and we know of none. Common sense suggests that to hold a school district negligent under such circumstances is to say that the school district must so build and maintain its premises as to preclude possibility of injury. Under such a rule, if a kindergarten pupil, who it is fair to assume could not under any circumstances be charged with contributory negligence, ran into a doorknob, the school district would be responsible. We have also heard of and observed minors of kindergarten age falling down steps especially constructed for minors of that age; does this mean that the school district is under the duty to build inclines rather than steps? The possibilities of such a rule may be multiplied ad infinitum.

Section 2, chapter 328, p. 675, Statutes of 1923, reads as follows: “Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy

such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.”

In our view of the matter, the faucet in question was not a dangerous or defective condition, and the evidence does not sustain the finding of the trial court that defendants “negligently and carelessly maintained and operated the premises * * * and particularly the * * * girls' lavatory thereof, in a dangerous and defective manner. * * *”

The judgment is reversed, and the court is directed to enter judgment in favor of the defendants.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 430

GARRIS et al. v. MITCHELL et al.

Civ. 5335.

District Court of Appeal, Third District,
California.

June 6, 1935.

1. Equity ⇐39(1)

Equity court assuming jurisdiction of subject-matter may retain that jurisdiction and require all matters relating thereto to be litigated in same action.

2. Receivers ⇐174(4)

Court in which receivership proceeding is pending may grant leave to institute independent action against receiver and others.

3. Insurance ⇐50

Insurance commissioner acting as receiver under court's authority in taking possession of insurance corporation's assets is trustee of those who are properly entitled to share in such assets and must conserve and protect their interest (St. 1919, p. 265, as amended).

4. Insurance ⇨50

General creditor of insurance corporation for which insurance commissioner had been appointed receiver could, with leave of court, maintain action against insurance commissioner and other general creditors for alleged conspiracy whereby other creditors obtained unlawful preference (St. 1919, p. 265, as amended).

5. Pleading ⇨18, 64(1)

In action by general creditor of insurance corporation for which insurance commissioner had been appointed receiver against insurance commissioner and other general creditors for conspiracy resulting in unlawful preference, complaint *held* not demurrable for uncertainty, unintelligibility, and ambiguity, or because several causes of action were improperly united (St. 1919, p. 265, as amended).

6. Insurance ⇨50

No presumption existed that insurance commissioner as receiver of insurance corporation acted properly in view of contrary allegations in general creditor's action based on alleged conspiracy resulting in unlawful preferences to other general creditors (St. 1919, p. 265, as amended).

7. Insurance ⇨50

Complaint stating cause of action for fraud against insurance commissioner as receiver of insurance corporation *held* not demurrable because prayer of complaint was also for removal of insurance commissioner as receiver.

8. Pleading ⇨193(8)

Fact that relief prayed for is greater than warranted by facts as disclosed by complaint is not ground for demurrer.

9. Receivers ⇨174(5)

Order of court granting leave to institute independent action against receiver *held* not objectionable on ground that order was not granted by same department in which receivership action was pending, since, there being but one court, the proceedings were governed by same rules as if both actions were in court with but single judge.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Roy S. Garriss and another against E. Forrest Mitchell, insurance commissioner of the state of California, and ex officio receiver and liquidator of the Union Automobile & Casualty Company, and others. From an adverse judgment, plaintiffs appeal.

Judgment reversed with directions.

V. P. Lucas and H. G. Bodkin, both of Los Angeles, for appellants.

John J. Taheny, of San Francisco, Syril S. Tipton, Elmer E. Sawyer, Newlin & Ashburn, and C. J. Harrison, all of Los Angeles, and Frank L. Guereña, of San Francisco, for respondents.

Mr. Justice pro tem. COATS delivered the opinion of the court.

At the time of the filing of the complaint the defendant E. Forrest Mitchell was the insurance commissioner of the state of California, and had been appointed receiver for the defendant Union Automobile & Casualty Company, a corporation.

Plaintiffs filed in the superior court in and for the county of Los Angeles an affidavit in which they state that they have a cause of action against said insurance commissioner as such receiver, and that the proceedings whereby he was appointed receiver were taken in an action brought, and then pending in said superior court, in and for the county of Los Angeles. The court then made its order granting plaintiffs leave to bring the present action. The demurrers of the defendants to plaintiffs' amended complaint were sustained without leave to amend, and from such judgment plaintiffs appeal.

The plaintiffs allege in their amended complaint the facts to be as follows: Plaintiffs are general creditors of the defendant Union Automobile & Casualty Company, a corporation. The defendants International Re-insurance Corporation, Associated Fire & Marine Insurance Company, and Independence Indemnity Company were also general creditors of said Union Automobile & Casualty Company. There are also a large number of other general creditors of said company. E. Forrest Mitchell, as insurance commissioner of the state of California, brought an action in the superior court, in and for the county of Los Angeles, against said Union Automobile & Casualty Company, under the provisions of the Act of April 30, 1919, as amended (St. 1919, p. 265, as amended, Deering's Gen. Laws 1931, Act 3739), and on June 3, 1932, he was appointed receiver for said company, and took possession of its assets. The insurance commissioners and the three defendants, International Re-insurance Corporation, Associated Marine Insurance Company, and Independent Indemnity Company, then entered into a conspiracy to

create an unlawful preference, and to defraud plaintiffs and the other general creditors by paying to said insurance companies 90 per cent. of their respective claims and without making the same proportionate payment, or any payment to the other general creditors. These claims were in the following amounts, to wit: International Re-insurance Corporation, \$98,481.74; Associated Fire & Marine Insurance Company, \$36,543.96; and Independence Indemnity Company, \$12,065.48. Pursuant to said conspiracy, said receiver paid to said insurance company 90 per cent. of their respective claims. The payments were made in violation of his trust as such receiver, and in violation of the orders of the court, and he refuses to take action for the recovery of said payments. As a result thereof, the assets of the receivership have been depleted, and the plaintiffs and the other general creditors have been deprived of their just proportion thereof, the assets of said corporation not being sufficient to enable said receiver to make the same proportionate payment to the other general creditors. The complaint also alleges that the defendant E. Forrest Mitchell will continue to create unlawful preferences, and to waste the assets in his possession. The prayer of the complaint is for the removal of the insurance commissioner as receiver; for the appointment of another receiver in his stead; for the return by the said insurance company, defendants, of the moneys unlawfully paid them to the receivership; and for other and general relief. Those allegations upon this appeal must be taken as true. The defendant Union Automobile & Casualty Company has filed no brief upon this appeal.

The defendants International Re-insurance Corporation and Independence Indemnity Corporation filed a joint demurrer. The other defendants demurred separately, the insurance commissioner being represented by the Attorney General.

The defendants differ in the manner of their presentation of the questions to be determined upon this appeal. There is, however, no dissension among the defendants as to the general principles of law involved. This court will, therefore, consider the questions involved on this appeal, without regard to the order of their presentation in the various briefs.

[1,2] To a large extent the general and special demurrers depend upon this ques-

tion: Has a general creditor the right to maintain an action of this nature against the insurance commissioner after he, in his official capacity, has been appointed receiver thereof by a court of competent jurisdiction? Many of the other points raised are incidental to, and are involved in the determination of this main question. Respondents first contend that the plaintiffs should have been compelled to seek their remedy in the action wherein the defendant insurance commissioner was appointed receiver. A court of equity, having assumed jurisdiction of the subject-matter, may retain that jurisdiction and require all matters relating thereto to be litigated in the same action. This has been the usual practice in the state of California, and it might have been better for the court to have followed this practice. It is, however, well established that, upon application, the court may grant leave that an independent action be brought. *De Forrest v. Coffey*, 154 Cal. 444, 98 P. 27; *State v. State Bank of Circleville*, 84 Kan. 366, 114 P. 381. It is within the discretion of the court to determine which course to adopt. In the present action the court, in the exercise of such jurisdiction, granted plaintiffs leave to bring an independent action.

[3] The complaint does, in ordinary and concise language, contain all the allegations ordinarily essential to a cause of action for fraud or conspiracy. Respondents, however, advance the argument that, when it appears from the face of the complaint that the insurance commissioner has under authority of court taken possession of the assets of an insurance corporation, he is the only person authorized to maintain an action to recover the assets of the corporation. The insurance commissioner under such circumstances is the trustee of those who are properly entitled to share in such assets and it is his duty to conserve and protect their interests. *De Forrest v. Coffey*, supra.

It has accordingly been held that while he is in charge of the receivership, he is the person to sue to collect the assets of the estate, and that the creditors under ordinary circumstances have no right to maintain such an action. The rule cannot, however, be invoked by the receiver to gain immunity for his own fraudulent acts.

[4] As a general principle of law, it has uniformly been held that when a receiver, such as a commissioner of banks, a build-

ing and loan commissioner, or an insurance commissioner, has himself been guilty of fraud, he is not above the law, but is amenable to the process of law, and that suit may be instituted against him by a stockholder or creditor to conserve or repossess the assets of the receivership. *Shaw, Banking Commissioner, v. Garner* (Tex. Civ. App.) 56 S.W.(2d) 274; *Taylor v. Spurway* (C. C. A.) 72 F.(2d) 97. It has likewise been held that the comptroller of currency and the receiver liquidating the business of a bank are amenable to law, and may be sued by the creditors in case they exceed their powers, or waste the estate, or fail to act to recover the property of the receivership. *Wittnebel v. Loughman* (D. C.) 9 F. Supp. 465. The like rule applies to trustees in bankruptcy. *Berman v. Smith* (D. C.) 171 F. 735. In fact, the rule is elementary, and is but a restatement of the law that when a trustee neglects to protect the trust property or repudiates or violates his trust, the beneficiaries may sue to enforce the trust. As to the cases cited by respondents, they either do not involve fraud on the part of the receiver or his refusal to act, or the plaintiffs sued without applying for leave, or, after having applied for such leave, and being denied the same. They also mainly relate to actions against directors, officers, and persons, other than the receiver, to recover property of the receivership. The law, as herein declared, has been recognized in this state. *Richardson v. Superior Court*, 138 Cal. App. 389, 32 P.(2d) 405. It is apparent that the complaint states a cause of action, and that plaintiffs, having obtained leave to sue, are entitled to maintain this action.

[5] There is no merit in the special demurrers based on uncertainty, unintelligibility, and ambiguity, or on the ground that several causes of action have been improperly united, or are not separately stated. The complaint is in one count, and in ordinary and concise language, states a cause of action for fraud and misapplication of funds in the hands of the receiver, in the perpetration of which fraud the three defendant insurance companies, general creditors of the receivership, participated.

[6] Respondents also urge that it will be presumed that the insurance commissioner acted in the proper exercise of his functions. In view of the express allegations

of the complaint to the contrary, there can be no such presumption.

[7, 8] The defendant E. Forrest Mitchell urges that, by reason of the fact that as a matter of law the only person entitled to act as receiver is himself, as insurance commissioner, and as plaintiffs seek to oust him as such receiver, and to secure another receiver in his stead, the complaint for this reason does not state facts sufficient to constitute a cause of action. It is conceivable that circumstances might arise when a court of equity, in the exercise of its jurisdiction, might oust the commissioner and appoint a receiver in his stead. *Richardson v. Superior Court*, supra. A determination of this question is, however, foreign to the present inquiry. The complaint states a cause of action for fraud, and contains a prayer for general and other relief to which plaintiffs would be entitled should they sustain the allegations of the complaint. It is no ground for demurrer that the relief prayed for is greater than warranted by the facts as disclosed by the complaint. In *Taylor v. Spurway*, supra, the complaint contained a similar prayer and the court made a like ruling.

[9] Respondents point out that the receivership action was pending in department 47, and that the order granting leave was made in department 1, and that, before plaintiffs could maintain this action, it was necessary for them to obtain permission from department 47. There is but one superior court in the county of Los Angeles. Although such court is divided into a number of departments to expedite the business of the court, the proceedings had are to be governed by the same rules as if the two actions were in a court with but a single judge. *Brown v. Campbell*, 110 Cal. 644, 43 P. 12; *People v. Martino*, 113 Cal. App. 661, 299 P. 86. The order granting leave was made by the court in which the receivership action was pending.

The court erred in sustaining the demurrers.

The judgment is reversed, with directions to the trial court to overrule the demurrers of defendants to plaintiffs' amended complaint, and to allow defendants a reasonable time to file answers if so advised.

We concur: PULLEN, P. J.; PLUMMER, J.

MEADER v. MILLER et al.
Civ. 10322.**District Court of Appeal, Second District,**
Division 2, California.**June 12, 1935.**

Rehearing Denied June 12, 1935.

Rehearing Denied July 11, 1935.

Hearing Denied by Supreme Court
Aug. 9, 1935.**Automobiles** ⇨244(26)

Evidence that owner of automobile, driven by another, was in it at time of accident and other evidence *held* sufficient to support court's findings that driver was acting in course of his employment as owner's chauffeur on owner's business at such time.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by H. C. Meader against Marilyn Miller and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Joe Crider, Jr., of Los Angeles, for appellants.

Rex B. Goodcell and Frank L. Simons, both of Los Angeles, for respondent.

CRAIL, Justice.

Defendants appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries arising out of an automobile collision. Defendant Miller was the owner of a Chrysler roadster, which at the time of the accident was being driven by her chauffeur, defendant Davis. The question of the negligence of the defendant Davis is undisputed. The court found that "the said defendant R. D. Davis was driving and operating the said Chrysler roadster automobile of the defendant Marilyn Miller in the course of his employment as the chauffeur of the defendant Marilyn Miller, and upon the business of the defendant Marilyn Miller," and gave judgment against both defendants. The case is now before us on a motion to dismiss appeal or affirm the judgment.

Defendants contend that there was no proof that defendant Davis was acting in the course of his employment at the time in question, or that he was given permission, express or implied, by defendant Miller to operate the automobile at said time, and that therefore plaintiff's case must

fail. Defendants' contention, however, is without merit. There is substantial evidence that defendant Miller was in her automobile at the time of the accident and there is other and additional evidence to support the court's findings.

Judgment affirmed.

We concur: **STEPHENS, P. J;**
FRICKE, Justice pro tem.



7 Cal.App.2d 543

PEOPLE v. WILSON.**Cr. 184.****District Court of Appeal, Fourth District,**
California.**June 12, 1935.****1. Criminal law** ⇨1081

Oral notice of appeal given when verdict was entered was premature and without effect.

2. Criminal law ⇨1081

Written notice of appeal from judgment of conviction and from order denying a motion for new trial *held* filed too late and ineffectual for any purpose, where it was filed five days after entering of judgment (Pen. Code, § 1239).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

E. D. Wilson was convicted of driving a vehicle on a public highway while under the influence of intoxicating liquor, and he attempted to appeal.

Appeal dismissed.

William J. F. Brown, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant, after conviction on a charge of driving a vehicle on a public highway while under the influence of intoxicating liquor, has attempted to appeal, and the respondent has moved to dismiss the appeal.

[1,2] When the verdict was entered, counsel for appellant stated that he was

giving oral notice of appeal. This notice was premature and without effect. *People v. Ward*, 138 Cal. 684, 72 P. 343; *People v. Hill*, 1 Cal. App. 414, 82 P. 398. Thereafter judgment was entered, no notice of appeal being then given. Five days later a written notice of appeal from the judgment and from an order denying a motion for a new trial was filed. This notice was too late, and was ineffectual for any purpose. Section 1239, Pen. Code; *People v. Lewis*, 219 Cal. 410, 27 P.(2d) 73; *People v. Sullivan*, 123 Cal. App. 436, 11 P.(2d) 420; *People v. Payne*, 106 Cal. App. 609, 289 P. 909.

The motion is granted, and the appeal is dismissed.

We concur: MARKS, J.; HARDEN, Justice pro tem.



TIMM v. MCCARTNEY et al.*

Civ. 10094.

District Court of Appeal, Second District,
Division 2, California.

May 31, 1935.

Rehearing Granted June 20, 1935.

1. Courts ⇨481

Trial court *held* not precluded from entertaining motion objecting to taking of testimony upon ground that no issue of fact was presented by pleadings, because same court in law and motion department by another judge overruled general demurrer to complaint.

2. Judgment ⇨743(1)

Parties to action for damages for failure to convey title *held* bound by prior judgment in quiet title suit wherein both litigants were parties.

3. Judgment ⇨682(1)

Purchaser of tract from realtors *held* not entitled to maintain action against realtors' vendor, who had obtained judgment against realtors in quiet title suit, for failure to convey title to purchaser where there was no privity of contract between purchaser and realtors' vendor.

4. Vendor and purchaser ⇨219

Complaint alleging that rental value of property was \$100 per month, and that, but for litigation, plaintiff could have had such benefit since date when defendant obtained judgment in quiet title suit *held* not to state cause of action where it was not alleged that plaintiff was kept out of possession of property during litigation, and facts alleged did not disclose that plaintiff was ever entitled to possession of property.

5. Vendor and purchaser ⇨219

Complaint by purchaser of tract from realtors against realtors' vendor alleging that purchaser was compelled to pay to vendor's transferee money "to obtain title to possession" of property *held* not to state cause of action for amount so paid, where basis of expenditure or how or in what manner vendor was obligated in relation thereto was not alleged.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Emma R. Timm against Alice G. McCartney and others, wherein defendants demurred. From a judgment, plaintiff appeals.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

C. E. McDowell, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

The plaintiff in the trial court appeals from a judgment awarded defendant after the court had sustained an objection to the taking of any testimony in the case upon the ground that no issue of fact was presented by the pleadings.

[1] Appellant first contends that it was error for the trial court to entertain such a motion, since the same court in the law and motion department by another judge overruled a general demurrer to the complaint. It is our opinion that this inconvenience is a necessary result of the practice of settling the pleadings in one department and of trying the issues in another department of the same court. While there is some difference of opinion as to the advantage of this practice, it is safe to say that most lawyers and most judges of the superior court of Los Angeles county, in which there are fifty departments, believe it is superior to the practice of each judge in de-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 49 P.2d 315.

partment settling the pleadings of cases assigned to his department. Very occasionally the law and motion department judge differs with the trial department judge, but this must be endured, as it would be quite impracticable to require the trial judge to proceed to trial of a case that to his mind presents no question of fact for trial that could result in a judgment upon the complaint.

Appellant next contends that each one of the three counts of her complaint states a cause of action, and we shall examine the complaint in the light of this issue.

[2] A firm of realtors purchased a tract of land from the defendant-respondent, Alice G. McCartney, subdivided it into lots and sold some of them. Emma R. Timm, plaintiff and appellant, was a purchaser. An overlying incumbrance secured the purchase price of the tract to respondent, and default having occurred, she sued the lot purchasers, including appellant, to quiet her title. Appellant had fully paid for her property, but had not secured her deed. Judgment went for plaintiff in such quiet title suit, but she was required to transfer such lots to the purchasers upon the payment by the realtors or their successors of a flat sum of money within a prescribed time. The above are the essential facts established by findings and judgment in another action to which both parties hereto were parties. Both parties are bound thereby.

The case went to the Supreme Court, and before decision there [McCartney v. Campbell, 216 Cal. 715, 16 P.(2d) 729] the legal title to the property purchased by appellant was transferred by Mrs. McCartney (February 15, 1929) to C. E. McDowell.

It is alleged in appellant's first cause of action that immediately upon the affirmation by the Supreme Court of the referred to action appellant demanded that respondent deliver her a deed of conveyance to the property in question, but that respondent failed, neglected, and refused to do so. That (alleged on information and belief) the payment of the money required to be paid to respondent had been paid or adjusted. That therefore appellant was damaged in the principal sum paid out for the property, and prayed judgment against respondent therefor with interest.

Assuming all of these alleged facts to be true, the title to the property transferred to McDowell was no greater than respondent's title, and was subject to all of the equities prescribed in the judgment to which reference has been made. The property, there-

fore, was not beyond the reach of appellant. McCartney v. Campbell, 208 Cal. 647, 284 P. 220. It may, however, be said that appellant should not be required to pursue the title through another legal owner, although this claim is completely negatived when we consider that the judgment provided for the issuance of a commissioner's deed should respondent, for any reason, see fit not to give one in the proper circumstances.

[3] But even if this conclusion should be erroneous, there is no cause of action stated. There never was any privity of contract between appellant and respondent. The money to be paid respondent as the equitable condition under which the subdivider of the tract should take title from respondent had no relation to the money paid the subdivider by appellant. There was a complete lack of any facts upon which a judgment that the money paid the subdivider should be "paid back" by respondent, or that such sum should in any manner be the measure of damages from respondent to appellant. It is conceivable that should respondent have made it impracticable for appellant to have received her title after all equities had been adjusted that she could be held to answer in damages for the value of the property, but no such cause of action is attempted to be stated. The rule, of course, is different where the original contract was between the owner and the purchaser. Cohen v. A. F. A. Realty Corporation, 250 N. Y. 262, 165 N. E. 285; Jackins v. Bacon, 63 Cal. App. 463, 468, 218 P. 1027; Bonnellfillio v. Ricks, 214 Cal. 287, 4 P.(2d) 929.

[4] The second cause of action alleged that the rental value of the property was \$100 per month, and that, but for this litigation, she could have had such benefit since March 3, 1928, the date of the judgment herein mentioned. It is not alleged that she was kept out of possession of the property during the litigation, but aside from that the facts alleged do not disclose that she was ever entitled to the possession of the property.

[5] The third cause of action alleges that appellant was compelled to expend and did pay to C. E. McDowell the sum of \$3,500 on March 30, 1935, "to obtain title to possession" of said property, and she prays judgment against respondent therefor. The basis of such expenditure, or how or in what manner respondent is obligated in relation thereto, is entirely lacking in the complaint.

No cause of action was stated against respondent in either count of the complaint,

and the trial court was correct in sustaining the objection to the receipt of any evidence. It is set up by demurrer and by answer that each cause of action is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. We do not think it necessary to consider this phase of the case.

The judgment is affirmed.

I concur: CRAIL, J.



7 Cal.App.2d 271

SMITH v. SMITH.

Civ. 10205.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1935.

1. Jury $\hookrightarrow$ 131(8)

In action by former wife to recover amounts allegedly due under property settlement agreement, questioning of jurors on voir dire respecting effect that a religious belief in regard to divorce and remarriage might have upon juror's mind *held* not error, especially since a certain religious belief played a large part in a pleaded defense (Code Civ. Proc. § 602, subd. 7; Civ. Code, §§ 158, 159; Const. art. 1, § 4).

2. Jury $\hookrightarrow$ 131(8)

While no person is rendered incompetent to be juror because of religious belief, yet because of his religious faith a prospective juror may be unable to try a certain case impartially, because of a resulting state of mind which would be a ground of challenge for cause (Code Civ. Proc. § 602, subd. 7; Const. art. 1, § 4).

3. Appeal and error $\hookrightarrow$ 1060(2)

In action by former wife to recover amounts allegedly due under property settlement agreement, action of counsel for husband in presenting to wife, while on witness stand, certain letters for her identification and then not offering them in evidence *held* not prejudicial error where contents of letters never came into body of evidence given to jury, and abandonment of intended offer was for lack of proper identification (Civ. Code, §§ 158, 159).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Grace Helen Smith against James Franklin Smith. Judgment for defendant, and plaintiff appeals.

Affirmed.

Joseph F. O'Malley and James A. Himmel, both of San Francisco, for appellant.

John Elliott Cook, of San Francisco, for respondent.

WILLIS, Justice pro tem.

In this action, appellant, a former wife of respondent, sued to recover amounts claimed to be due and unpaid under the terms of a certain property settlement agreement executed by the parties prior to their divorce. On September 28, 1923, an agreement was executed by the parties to this action wherein, among other things, it was provided that respondent should pay to appellant the sum of \$250 monthly as long as appellant remained unmarried, such payments being secured by hypothecation of certain corporate stock. Respondent fully performed this agreement up to May 28, 1928, when a new agreement was executed under authority of sections 158 and 159 of the Civil Code, wherein the agreement of 1923 was confirmed, and whereby it was provided that the monthly payments should be increased to \$300, similarly secured, and that respondent should make a cash payment to appellant of the additional sum of \$10,000, in consideration of which added burdens on respondent appellant agreed to refrain from attacking or violating any of the terms of the agreement or from making any demands on respondent or against any property confirmed by the agreement to respondent as his separate property, or from molesting or interfering with respondent or his full enjoyment of any of said property; and it was therein further agreed that upon breach of such latter promises by appellant the last agreement should be of no further force or effect except in so far as it confirmed the agreement of September 28, 1923, and that thereafter the rights of the parties should be governed by the first agreement of 1923, and that all payments made by respondent under the second agreement, to wit, the extra \$50 per month and the sum of \$10,000, should be considered as payments in advance and should apply on payments required by the 1923

agreement. On May 29, 1928, appellant obtained an interlocutory decree of divorce from respondent, and therein this property settlement agreement was approved by the court. A final decree was entered thereon in 1929, and thereafter respondent was married to another.

Under this modified agreement, respondent paid the sum of \$10,000 to appellant and made all payments as provided until about October, 1931, when his payments were made in lesser amounts than required by the agreement, and about April, 1933, he ceased to pay anything on the agreement for monthly payments. In January, 1934, appellant commenced this action on the agreement of 1923 and its modification of 1928, and at the date of trial alleged and claimed the sum of \$5,900 as being the amount then in arrears. Respondent pleaded in his answer a breach of the molestation covenant in the agreement of 1928, and claimed that the extra payments under the last agreement were in excess of all payments that had then accrued under the first agreement. The case was tried by the court with a jury, and a verdict was rendered in favor of respondent, on which judgment was entered. A motion for new trial was made by appellant and denied. The appeal is from the judgment.

[1,2] Appellant complains of statements made to prospective jurors and questions asked of them by counsel for respondent on the voir dire examination respecting the effect that a religious belief in regard to divorce and remarriage might have upon the juror's mind. There is no merit whatever in this point. Both parties had the right to secure jurors who were unbiased. One of the causes for challenge for cause is "the existence of a state of mind in the juror evincing enmity against or bias to either party." Code Civ. Proc. § 602, subd. 7. The explanatory statements made and the questions predicated thereon by counsel for respondent were all to the end that the juror's state of mind in the above respect might be ascertained. The propriety and justification thereof are fully exemplified by the evidence subsequently introduced, showing that a certain religious belief played a large part in the pleaded defense of molestation. While it is certain that no person shall be rendered incompetent to be a juror on account of his opinions on matters of religious belief (Const. art. 1, § 4), yet it is equally true

that because of his religious faith a prospective juror may be unable to try a certain case impartially, because of a resulting state of mind which would be a ground of challenge for cause. 15 Cal. Jur. 354; In re Estate of Malvasi, 96 Cal. App. 204, 210, 273 P. 1097. Furthermore, it appears in the record herein that no challenge for cause was allowed by the court, both parties exercising only peremptory challenges.

Appellant also complains of error in rulings of the court on objections to admission of evidence of two certain letters and files of the municipal court of the city and county of San Francisco. No error is made to appear in either of these instances. The letters were clearly admissible under the issue of molestation, and the files of the municipal court shown and read in evidence were relevant evidence and were original files and therefore competent, and not copies, as intimated by appellant.

[3] Complaint is also made by appellant of prejudicial error as a result of the action of counsel for respondent in presenting to appellant, while on the witness stand, certain letters for her identification and then not offering them in evidence, it being contended that the trial court erred in permitting this "dramatic trial technique" to be performed before the jury. We are entirely unable to see wherein any prejudice could arise from an attempt to lay a foundation for the offer of letters in evidence, and a subsequent abandonment of the intended offer for lack of proper identification, when the contents of such letters never came into the body of the evidence given to the jury.

The remaining contention of appellant is that the evidence is insufficient to sustain the verdict and judgment. There is no merit in this contention. There was abundant evidence on the subject of molestation which not only is legally sufficient to sustain the verdict, but which other evidence in the case showed was of such extent and consequence that respondent felt obliged to remove from his former habitat in and near San Francisco, where he was a leading member of the medical profession, and seek a new and less troubled home and field for practice in Los Angeles.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.

7 Cal.App.2d 395

O'NEIL v. DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS et al.
Civ. 10276.

District Court of Appeal, Second District,
Division 2, California.

June 5, 1935.

Licenses ⇨38

Neither department of professional standards, contractors' license bureau, registrar of contractors, his deputies, district supervisor, or any other official acquired jurisdiction to find contractor, whose license had expired, guilty of violating Contractors' License Law and direct that no renewal or new license be issued to him until registrar was satisfied that he was worthy thereof (Deering's Gen. Laws Supp. 1933, Act 1660, §§ 4, 5, 7, 9).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by John J. O'Neil to review an order of the Department of Professional and Vocational Standards, by Carlos W. Huntington, Registrar of Contractors, finding petitioner guilty of violating the Contractors' License Law after hearing on a complaint filed by Isabel Lambert. From a judgment affirming the order, petitioner appeals.

Reversed, with direction.

John E. McCall, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondents Department of Professional and Vocational Standards and Carlos W. Huntington, registrar of contractors.

STEPHENS, Presiding Justice.

This is an appeal from a judgment of the superior court in a writ of review sued out against the "Department of Professional and Vocational Standards, Carlos W. Huntington, Registrar of Contractors and Isabel Lambert." The matter here is upon the amended petition.

Title 130a, Act 1660, General Laws, Deering's 1933 Supplement, sets up an elaborate system of licensing general contractors and places its administration under the jurisdiction of, and creates a bureau within, the department of professional and vocational standards (section 377 et seq., Pol. Code) which shall be known as the contractor's li-

cense bureau. A "registrar" and "deputy registrar" of contractors is authorized (section 4). To obtain a license under the act, application must be made setting forth certain detail, and no license is issued until and unless the applicant has satisfied the "registrar" of his integrity and fitness (section 5). All licenses expire on the last day of June of each year, and renewals may be had (section 7). The registrar is authorized to initiate or to entertain upon a verified complaint an investigation looking to the suspension or permanent revocation of such license for certain causes (section 9).

The instant case was started before the registrar by the filing of a complaint against petitioner by Isabel Lambert alleging various causes of complaint in petitioner's execution of a dwelling contract that had theretofore been entered into between them. The prayer for relief is general in nature. The hearing was had before a "District Supervisor," the testimony was reduced to writing, and such district supervisor made "Findings and Recommendation." Under such heading, the district supervisor found certain facts alleged to be true, and recommended that petitioner be "found guilty and his name be flagged in Sacramento, and that no renewal of license or new license be issued until such time as the Registrar of Contractors is satisfied that he is worthy of having a contractor's license." Apparently, though this does not definitely appear, this report reached the "Registrar of Contractors," who made a decision in conformity with such recommendation.

From the first, petitioner objected to any proceedings upon the ground that there was no jurisdiction therefor, and he offered no evidence, although he answered questions put to him by the "District Supervisor." One ground as to jurisdiction was that petitioner was not at the time of the proceeding a licensed contractor, and it is not claimed that he was. His license had expired, and he had not asked its renewal. Another ground is that the whole matter was the subject of a pending lawsuit in which the complainant was plaintiff and petitioner defendant. Petitioner alleges that such suit has been determined in his favor. This seems to be undenied.

The superior court entered the following order as a judgment: "It is therefore ordered, adjudged and decreed that the order of said respondents heretofore made finding petitioner guilty of the violation of subdivisions 1, 2, 4, 5, 7 and 10 of Section 9 of the

Contractor's License Law of the State of California (Stats. 1929, Chap. 791, as amended; Stats. 1933, Chap. 573) be, and the same is hereby affirmed."

This judgment omits the penalty, and therefore does not completely conform to the decision of the registrar, who apparently realized that the act only authorized the revocation or suspension of a license in existence. The registrar's decision provided that petitioner was guilty of charges made, and that defendant be "flagged" in Sacramento so that he could get no renewal or new license until the "Registrar of Contractors is satisfied that he is worthy of having a contractor's license."

Although the point is not raised, neither the source nor the authority of the officer designated as "District Supervisor" is clear. Throughout the act it is provided that the registrar (he is allowed deputy registrars) shall hear complaints.

We think it is clear that neither the department of professional standards nor the bureau nor the officers provided for by the act herein under consideration, nor any other official acquired any jurisdiction of petitioner to consider or make any order, and that the order made is null and void. This, of course, because petitioner herein was not a licensed contractor at the time of the proceeding, which is a precedent necessity before any action is authorized.

The judgment of the superior court is reversed, with direction that it adjudge and decree that the order made by the registrar of contractors be declared null and void for lack of jurisdiction.

I concur: CRAIL, J.



7 Cal.App.2d 496

OTIS v. I. EISNER CO. et al.
Civ. 5340.

District Court of Appeal, Third District,
California.
June 11, 1935.

Hearing Denied by Supreme Court
Aug. 9, 1935.

1. Usury ☞52

When bonus is paid for making of loan, bonus must be considered as interest and taken out of principal at time of making of

loan, and interest then computed on remainder of principal, and if on such calculation, interest so computed, plus bonus, exceeds 12 per cent. per annum, contract is usurious (St. 1919, p. lxxxiii).

2. Usury ☞52

In view of fact that bonus paid for making of loan must be considered as interest, amount of principal and also amount of monthly installments specified in bond must be regarded in determining whether bond is usurious.

3. Usury ☞50

Monthly payments of principal and interest must be applied first to interest due at time of payment and then to principal in determining whether contract is usurious.

4. Usury ☞52

Where bond executed on April 1, 1928, for principal sum of \$450,000, bearing 8 per cent. interest provided for monthly payments of principal and interest which would reduce principal to \$207,000 at date of maturity on June 1, 1933, loan held not usurious, notwithstanding exacting of \$45,000 bonus made \$405,000 real amount of loan, since actual rate of interest is the rate which will reduce principal to amount of last installment (St. 1919, p. lxxxiii).

5. Usury ☞16

Court will disregard form and look to substance to determine if requisites of usury are present, despite disguise, but it will not use guise of false transaction to brand a contract as usurious, when, according to reasonable rules, it is not to be so construed (St. 1919, p. lxxxiii).

Appeal from Los Angeles County;
Charles L. Bogue, Judge.

Action by E. G. Otis, receiver of the Quinby Corporation, against the I. Eisner Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant.

Louis M. Lissner, Isadore H. Prinzmetal, Overton, Lyman & Plumb, Cecil A. Borden, Loeb, Walker & Loeb, and Earl Adams, all of Los Angeles, for respondents.

Mr. Justice pro tem. COATES delivered the opinion of the court.

The Quinby Corporation executed to the defendant I. Eisner Company two certain

notes or bonds, denominated in the instruments themselves as bonds, and which for convenience will hereafter be referred to as such. The first of these was executed on April 1, 1928, for the principal sum of \$450,000, and the second on June 26, 1929, for the sum of \$274,566.66. The second bond was in renewal of the first bond, and was for the unpaid balance of the original indebtedness. After default was made in the payments of principal and interest, plaintiff, as receiver for the Quinby Corporation, brought this action claiming that the bonds were usurious and asking for a money judgment for the interest paid, and for other relief. From the judgment of the trial court in favor of defendants, plaintiff appeals.

The claim of plaintiff is that the transaction was usurious in the inception, and that the renewal, being connected with, or growing out of the original transaction, is also tainted with usury. The appeal is on the judgment roll. The court in its findings clearly sets forth the particulars of the transaction.

On April 1, 1928, the Quinby Corporation executed to the defendant I. Eisner Company a bond for the principal sum of \$450,000, and bearing interest at the rate of 8 per cent. per annum, payable monthly on the first day of each month. The principal sum was also payable in monthly installments on the first day of each month, beginning May 1, 1928. These installments were sixty-two in number, and for the following amounts: For the months of May, 1928, to December, 1928, inclusive, the sum of \$1,666.67 each; for the month of January, 1929, the sum of \$1,666.64; for the months of February, 1929, to January, 1930, inclusive, the sum of \$3,000 each; for the months of February, 1930, to December, 1930, inclusive, the sum of \$4,166.67 each; for the month of January, 1931, the sum of \$4,166.63; for the months of February, 1931, to January, 1932, inclusive, the sum of \$4,500 each; for the months of February, 1932, to May, 1933, inclusive, the sum of \$5,500 each; and the last installment on June 1, 1933, for the remainder of the principal, to wit, the sum of \$207,000. The bond was secured by a deed of trust, and before it was executed a permit was applied for and secured from the commissioner of corporations, authorizing the Quinby Corporation to incur an indebtedness of \$450,000. The real amount of the money loaned, how-

ever, was the sum of \$405,000, the remainder being in the nature of a bonus for the making of the loan. The court treated this \$45,000 as interest, and adopting plaintiff's calculations, found from the foregoing facts that the rate of interest throughout the entire period of the bond was 12.03293 per cent. per annum, and, therefore, usurious. It further found that the bonds were issued pursuant to the permit from the commissioner of corporations, and, therefore, did not come within the provisions of the Usury Act (St. 1919, p. lxxxiii). It accordingly affirmed the judgment.

The briefs are largely devoted to questions relating to the extent of the protection afforded the parties to the transaction by the permit issued by the commissioner of corporations. It will not be necessary to pass upon these questions, as the contract is not usurious, the trial court having been in error when it determined that the rate of interest exceeded 12 per cent. per annum.

The determination of the interest rate requires careful arithmetical calculations. Neither party questions the accuracy of the arithmetical results obtained by the other, but they use different methods to calculate such interest, and thereby arrive at different results. The error of the court is due to the fact that it adopted the scheme of the plaintiff in the calculation of such interest.

[1-4] The case of *Lewis v. Pacific States Savings & Loan Co.*, 1 Cal. (2d) 691, 37 P.(2d) 439 decided after judgment was rendered in this case, clearly defines the law applicable to the facts of this case, and prescribes the rule to be followed in the computation of interest to determine its usurious character. It is as follows: When a bonus is paid for the making of a loan, it must be considered as interest, and taken out of the principal at the time of the making of the loan, and interest then computed upon the remainder of the principal. If upon such calculation, the interest so computed, plus the bonus, exceeds 12 per cent. per annum, the contract is usurious, and, if not, there is no usury. It is only necessary to apply this rule to the present case.

The nominal loan was \$450,000. The interest at the rate of 8 per cent. per annum amounts to \$144,553.33. This amount plus the bonus of \$45,000 makes the actual interest \$189,553.33. The real loan was

\$405,000. The bond calls for payments of principal and interest, which will, at the date of its maturity, reduce the principal to \$207,000. By reason of the fact that the real loan was \$405,000, not only the amount of the principal specified in the bond, but also the amount of the installments so specified must be disregarded in determining whether the contract is usurious. The monthly payments of principal and interest are to be applied according to the well-established rule that such payments shall first be applied to the interest due at the time of payment, and then to the principal. *Monroe v. Fhol*, 72 Cal. 568, 14 P. 514. Using this rule it is determined that an interest rate of 11.18 per cent. per annum, or .0093178 per cent. per month will so reduce the principal to \$207,000, and that the total interest at said rate will equal the actual interest, to wit, said sum of \$189,553.33. Applying the illustration given in *Lewis v. Pacific States Savings & Loan Co.*, *supra*, interest at the rate of 12 per cent. per annum would produce a sum considerably in excess of \$200,000, but there will remain unpaid upon the principal a sum considerably in excess of the last installment of principal, which excess the maker of the bond would, of course, not be required to pay. The illustration is used for the purpose of showing that transaction is not usurious. The real rate of interest is, however, manifestly the rate that will reduce the principal to the amount of said last installment. As before stated, this rate is 11.18 per cent. per annum. The transaction is clearly not usurious.

[5] All parties are in agreement as to the correctness of the sum of \$189,553.33, but according to the trial court's computations, this amount, over the full period of the bond, exceeded the maximum interest allowable by \$623.33, and produced a rate above 12 per cent., to the extent of .03293 of 1 per cent. As before stated, the court adopted the scheme of the plaintiff. The reason for the error is made apparent by plaintiff's brief. He reduced the nominal principal to the true amount, but, nevertheless, holds the monthly installments thereof to the exact amounts stated in the bond, although it should be manifest that if the principal cannot remain at the nominal amount, neither can the installments thereof. He then applies the monthly payments first to the amount of the nominal or unreal installment of principal specified

in the bond and then to the interest. By this method the principal is monthly reduced below the true amount thereof and the interest on the principal so reduced would, of course, appear larger proportionately in amount than it actually amounts to when calculated on the real principal. In other words, there is created an artificially low principal and an artificially high rate of interest. The result is that, according to this method of calculations, at the date of the maturity of the bond, the final installment of principal is reduced to \$162,000 instead of the \$207,000 specified in the bond, and the final monthly interest payment totals more than \$45,000. This explains the finding of the court, for by such reasoning does plaintiff endeavor to establish, and does the court base its finding, that the contract is usurious. Plaintiff in fact asks the court to set aside the transaction as fictitious, for the purpose of arriving at the true basis for the computation of interest, and then to immediately restore and adopt such fictitious transaction for the purpose of calculating such interest. Plaintiff's position is analogous to that of the man who would "eat his cake and have it, too." The court, in determining whether a contract is usurious, will disregard the form and look to the substance to determine if the requisites of usury are present, despite the disguise (*Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725), but it will not use the guise of the false transaction to brand a contract as usurious, when, according to reasonable rules, it is not to be so construed.

The conclusion of the court, based on the particular facts found, was wrong, and this affirmatively appears from the record. Therefore, the court exercising the powers given it by section 956a of the Code of Civil Procedure, does hereby amend the findings of fact in this case as follows:

Paragraph XXV is struck out and the following paragraph is adopted in its stead:

XXV. That the rate of interest required under said bond by the Quinby Corporation to I. Eisner Company is less than 12 per cent. per annum.

In paragraph XXIX, in the second line of said paragraph, as it appears in the transcript, strike out the words "on account of principal."

The findings, as modified, support the judgment of the court.

The judgment and order denying plaintiff's motion for another and different judgment are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



7 Cal.App.2d 401

BOLAND v. BOLAND.

Civ. 9819.

District Court of Appeal, First District,
Division 2, California.

June 6, 1935.

Hearing Denied by Supreme Court
Aug. 5, 1935.

1. Husband and wife ☞278(2)

Contract made between husband and wife after separation and while they were living apart, whereby husband agreed to give wife community property and percentage of his income in consideration of wife's release of claims for support, *held* valid and not against public policy, though fact of separation was not expressly recited therein (Civ. Code, §§ 159, 1636, 1643, 1647, 1648).

2. Contracts ☞143

Interpretation which will render contract lawful is preferred over interpretation which will make it unlawful.

3. Evidence ☞417(9)

If husband and wife are in fact separated and contract to live apart, fact of separation may be shown by competent evidence other than written stipulations of parties.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Genevieve L. Boland against F. Eldred Boland. Judgment for plaintiff, and defendant appeals.

Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

Rosenshine, Hoffman, Davis & Martin, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment against defendant for \$8,995.40 based on

a contract in which defendant agreed to pay plaintiff not less than \$500 per month.

Plaintiff and defendant were married in 1910. They separated January 10, 1929, and on or about February 28, 1929, they entered into an agreement whereby plaintiff was to receive all the community property, amounting to between \$50,000 and \$75,000, and 25 per cent. of defendant's income, but never less than \$500 per month. In consideration plaintiff released defendant from all claims against him which she then had or might have in the future for support and maintenance. Defendant transferred the community property and paid \$500 monthly for a while. He then reduced the payments, and, finally, in October, 1933, stopped paying altogether. On February 27, 1934, plaintiff instituted this suit for money due her under the \$500 monthly clause in the contract. Defendant attempted to rescind the contract, claiming that he had been coerced into signing it. The court found against him, and gave plaintiff judgment for the full amount unpaid up to May 31, 1934. Defendant now appeals on the ground that the second part of the contract which provides for his wife's support is void as a matter of law; it being (1) against good morals and public policy; (2) in contravention of section 159, Civil Code; and (3) oppressive. He bases the first two claims on the contention that, under the contract, each party is forever released from any and all legal obligations growing out of the marriage relation, although there is no mention of a separation in the contract. But respondent argues that the contract does not purport to alter any relations except as to property rights, and that since husband and wife had already separated it was not necessary to include the separation agreement in the property settlement contract. Appellant further contends that, even if the contract be held valid, it cannot be effective until approved by a court of equity as in a separate maintenance proceeding.

[1-3] This appeal presents just one debatable question; whether a contract between husband and wife, which was made after they had separated and while they were living apart, is void because it does not expressly recite the admitted fact of separation.

Appellant's argument that the contract is contrary to public policy, to good morals,

and to the requirements of section 159 of the Civil Code, because made after separation and not as an agreement to separate, is untenable under the settled rule found in *Brown v. Brown*, 83 Cal. App. 74, 82, 256 P. 595; *Cookinham v. Cookinham*, 219 Cal. 723, 726, 28 P.(2d) 1045, and *Huntsberger v. Huntsberger* (Cal. Sup.) 43 P.(2d) 258. The subject is so well covered in *Brown v. Brown*, supra, where the cases cited by this appellant are discussed and distinguished, that no good purpose would be served in a repetition of that discussion here.

But appellant argues that the contract here involved presents some special invalidity because it does not contain an express recital that the parties had already separated. No authorities are cited to the point, though reference is made to the bare statements found in *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, *Rottman v. Rottman*, 55 Cal. App. 624, 204 P. 46, and *Lane v. Lane*, 78 Cal. App. 326, 248 P. 686, to the effect that the contracts did not contain such recitals. In all of those cases the contracts were held void, not because of the absence of such recitals, but because the parties were in fact living together and were attempting by contract to alter and settle their marital relations. Here the contract specifies and reiterates that the parties are adjusting their property rights only, and this is well within the provisions of section 159 of the Civil Code.

The question is one which must be answered on general principles. The trial court found that the parties had separated before the agreement was executed and ever since have been living separate and apart. The contract was made on February 28, 1929; this finding was made on August 7, 1934. The evidence supporting it was received without objection and is not controverted. The whole tenor of the agreement shows that the parties did not contemplate either a resumption of the marriage relation or a divorce, but that they did intend to adjust their property rights in view of the then existing separation. Section 1636 of the Civil Code provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Section 1643 reads: "A contract must receive such an interpretation as will make

it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 1647 reads: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Section 1648 reads: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

The general rule to be drawn from these sections, and from the authorities as well, is that when one of two possible interpretations will render a contract lawful and the other will make it unlawful, the former is to be preferred. We find nothing in the contract involved here which would indicate an intention of the parties to make an illegal agreement altering their marital status. Everything points to a fixed intention to adjust and settle their property rights in view of the separation. As the mutual intention of the parties is the foundation for the interpretation of all contracts, we can see no reason why the failure to recite the fact of separation should affect the validity of this one. A fact is a fact, and it makes little difference what evidence is used to prove it. Thus, if the parties are in fact separated and contract to live apart, that fact may be shown by competent evidence other than the written stipulations of the parties, since none of the statutes referred to require such stipulations to be made a part of the contract. The public policy and morals involved in contracts of this kind relate to the maintenance of the institution of marriage. *Brown v. Brown*, supra. But the law permits the adjustment of property rights between husband and wife who are living apart, and, when the actual separation is shown, the questions of public policy and morals do not control the interpretation of the contract.

Appellant argues to some length that the trial court should have refused to enforce the contract as unjust and oppressive and should have made its own order for the wife's support commensurate with the husband's ability to pay. Without holding that the trial court had the right, it is sufficient to say that it did take evidence on both of these issues at the instance of the appellant and that it found against the appellant in both. No attack is made

on these findings, and hence no question is presented here for decision.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



7 Cal.App.2d 178

**OSWALD v. PACIFIC ELECTRIC RY.
CORPORATION.**
Civ. 8922.

District Court of Appeal, Second District,
Division 2, California.

May 24, 1935.

Rehearing Denied June 13, 1935.

Hearing Denied by Supreme Court
July 23, 1935.

Limitation of actions §28(1)

Action to recover money paid to railroad as reasonable proportion of cost of main spur line adjoining plaintiff's land, and which money the railroad did not agree to return in any event or on any condition, *held* an action in implied assumpsit as for money had and received, and to which two-year statute of limitations applied, as against contention that action was based on liability created by Public Utilities Act, and to which three-year statute of limitations applied (St. 1915, pp. 130, 135, 165, §§ 25 (a, b), 39 (a), 73 (a); Code Civ. Proc. § 338, subd. 1, § 339, subd. 1).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by George H. Oswald against the Pacific Electric Railway Corporation. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

George D. Blair, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for respondent.

CRAIL, Justice.

The plaintiff appeals from a judgment of nonsuit in an action brought to recover \$27,356.34, which had been paid by the plaintiff to the defendant under the following circumstances: The plaintiff owned

100 acres of land. The defendant, a public utility, owned a right of way and main spur line adjoining said land. The plaintiff made application for a spur track connection with the trackage of the defendant in order to serve the plaintiff's land. In April, 1929, a conference was held between the plaintiff and the president of the defendant in regard to the proposed spur track, at which time the president of the defendant stated that a concern known as Reliance Rock Company had put up some of the original money to get the main spur line built there and that, before he could consent to plaintiff's joining the trackage, plaintiff would have to pay a portion of the original cost of the main spur. When asked how much it would cost, the president said he did not remember the exact figures, but it was around \$50,000 that the rock company had paid. Counsel for plaintiff said, "Well, aren't we legally entitled to join your trackage?" Whereupon the president put his hand on a map and said, "You may be legally entitled to join the trackage but before you join it I will take it to the Supreme Court of the United States unless you pay your proportionate amount." To which counsel for plaintiff said, "Well, we do not want any litigation if we can avoid it. We have a valuable piece of property and want to be served." The president of defendant replied, "That is the only condition upon which I can let you join." He agreed to send the details of the proportionate cost by letter. On April 26, 1929, the defendant wrote the plaintiff a letter giving the details of the costs. The substance was as follows: "The cost to the World Rock Co. [the plaintiff] for portion of main line spur from San Bernardino Line to the Reliance plant is as follows: (a) 1/3 of the 1/2 interest now owned jointly by the Reliance Rock Company and the Consumers Rock and Gravel Company * * * \$12,122.08. (b) 1/2 of Reliance Rock Company's 1/2 interest * * * \$15,234.26. Cost to World Rock Company, not including cost of proposed spur, \$27,356.34." In addition to the above, the company asked for "Cost of spur track off of the Reliance spur * * * \$1,320."

On June 8, 1929, the plaintiff paid the said sums to the defendant. On June 21, 1929, the defendant sent to the plaintiff an "Industrial Track Agreement" to be executed by the plaintiff covering the erection of the spur and the general terms upon

which the defendant would serve the plaintiff. This agreement was never executed by the plaintiff. And the spur track connection for the plaintiff was never constructed by the defendant. Prior to commencing the action, plaintiff made demand for the return both of the \$1,320 item and the \$27,356.34 item. The cost of the spur track connection was returned, but the defendant refused to return the cost of the proportionate interest in the right to use the main spur track, the contention of the defendant being that the \$27,356.34 was paid by the plaintiff to purchase a right to use the Reliance Rock spur on reasonable terms.

Plaintiff now says it was the theory of the plaintiff's action in the lower court that the plaintiff had a legal right under the law to join the trackage of the railway company and was entitled to service without the payment of any sum whatsoever except the cost of the actual construction of the spur track from the lines of the railway to the property of the plaintiff, and that the demand of the railway company for the \$27,356.34 was unlawful and that the action of the defendant as above set forth amounted to fraud, and further that the plaintiff received nothing of value from the defendant for said sum, and further that the railroad violated the Public Utilities Act (St. 1915, c. 91, p. 115, as amended), and that under section 73(a) of said act the plaintiff had a right to sue and recover the said sum. The complaint was filed May 15, 1932, more than two years after the money was paid by the plaintiff to the defendant. The defendant interposed the defense that the action was barred by the two-year provisions of section 339, subdivision 1, Code of Civil Procedure.

If there is any written agreement in this case, it must be found in the letters above set forth, but nowhere in any of the letters can be found a written agreement on the part of the defendant to return the money, in any event or upon any condition.

In our opinion this case is similar to the case of *Thomas v. Pacific Beach Company*, 115 Cal. 136, 46 P. 899, 900. In that case the plaintiff sought to recover back the purchase price paid for certain land which the defendant had agreed in writing to convey to the plaintiff upon such payment, but which defendant failed to convey after the payment had been made. The trial court gave judgment for the plaintiff. The

question on appeal was whether or not the action was barred by the two-year statute of limitations. The Supreme Court said: "There is in this contract no express stipulation or agreement to do the thing which the action seeks to enforce. * * * Actions of the character of the one at bar have been uniformly treated as actions resting in implied assumpsit as for money had and received [citing cases]; and, under the facts alleged, we think this case must be so regarded and as governed by the two-years' limitation prescribed by subdivision 1 of section 339." This case was cited with approval in the case of *Scrivner v. Woodward*, 139 Cal. 314, 73 P. 863.

The plaintiff relies largely upon the Public Utilities Act which provides (section 25(a) and 25(b) that every railroad corporation upon application of a contemplated shipper for a connection between its railroad and any contemplated private track shall make such connection and provide such switches and tracks as may be necessary. This, however, is not an absolute or unqualified right. The plaintiff overlooks certain provisions of the act. One of the conditions of said right which is incorporated in the very sentence which creates the right reads as follows: "Provided * * * that the business which may reasonably be expected to be received by such railroad corporation over such connection is sufficient to justify the expense of such connection to such railroad corporation." Said act further provides (section 39 (a) that "whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that application has been made by any corporation or person to a railroad corporation for a connection or spur as provided in section 25 of this act, and that the railroad corporation has refused to provide such connection or spur and that the applicant is entitled to have the same provided for him under said section 25, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe." One of such "reasonable terms" might well be (quoting the language of the same section) "upon payment to the party or parties incurring the primary expense of such private track, tracks or railroad, or the connection therewith or of such spur, of a reasonable proportion of the cost thereof." The plaintiff never filed a complaint with the Railroad Commission.

What he did do was to negotiate the reasonable proportion of the cost of the Reliance Rock spur to be borne by him. The letters state exactly what he was paying for.

The plaintiff next contends that his cause of action was based on fraud. If so, he was not skillful in making clear that fact in his complaint. The complaint is entitled "Breach of Contract," and there is not the slightest suggestion in it that it was based on fraud. The word "fraud" is not used in the complaint. And the defendant contends that the first knowledge which it received that the plaintiff made such contention came to the defendant in appellant's opening brief. The essential averments required to state a cause of action based on fraud are lacking in the complaint, and it is equally true that the plaintiff wholly failed to prove a cause of action for fraud.

It is the final contention of the plaintiff that his cause of action is based on a "liability created by statute," that is, the said Public Utilities Act. The significance of this contention arises from the fact that section 338, subdivision 1, of the Code of Civil Procedure provides that an action on a liability created by statute may be brought within three years. It is obvious from what we have said that the plaintiff's cause of action was not based on any such liability, but was based upon the breach of an implied contract and an action resting in implied assumpsit as for money had and received.

Judgment affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



7 Cal.App.2d 502

ROSE v. DUNK-HARBISON CO. et al.

Civ. 9230.

District Court of Appeal, Second District,
Division 1, California.

June 12, 1935.

Rehearing Denied July 11, 1935.

Hearing Denied by Supreme Court
Aug. 9, 1935.

1. Limitation of actions § 55(1), 72(1)

Three-year statute of limitations, in action for alleged conversion of stocks by bro-

kerage house which altered its books so as to show that customer's separate property was held in joint tenancy, began to run on date of conversion, which occurred about the time customer died, and if statute was interrupted during period of minority of heir who received one-half interest in all the estate of customer by decree of distribution, it again began to run when heir became of age, as against contention that statute did not begin to run until heir first learned of conversion several months after he became of age (Code Civ. Proc. § 338, subd. 3).

2. Limitation of actions § 95(1)

Generally, statutes of limitation commence to run when a cause of action is complete, and fact that injured party is without knowledge of wrong committed does not toll statute except in cases of fraud.

3. Limitation of actions § 95(1)

Cause of action is not suspended merely because party is ignorant of fact that he has a cause of action or of identity of the one who committed a certain act.

4. Appeal and error § 1041(2)

Denial of leave to file third amended complaint after demurrer was sustained to second amended complaint without leave to amend held not error, where facts upon which appellate court expressed its views were also set forth in proposed third amended complaint.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Watson S. Rose against the Dunk-Harbison Company and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Lyon, Fleming & Robbins, of Los Angeles, for respondents.

SHINN, Justice pro tem.

The court sustained a demurrer to plaintiff's second amended complaint without leave to amend, and entered judgment of dismissal, from which plaintiff prosecutes this appeal. Numerous points were raised by the demurrer, and argument thereon is presented at length in the briefs of counsel. One of the grounds of demurrer was that the action is barred by the provisions of section 338, subd. 3, Code Civ.

Proc., and this defense, we think, is good, and sufficient to support the judgment appealed from.

[1] The action is to recover the value of certain corporate stocks, alleged to have been converted by the defendant, a stock brokerage house. The alleged conversion consisted of the alteration of defendant's books so as to show a certain trading account of defendant's customer, Emmason C. Rose, which was his separate property, to be held in joint tenancy by the customer and his wife, Beatrice S. Rose. Emmason C. Rose died on June 10, 1927, and the alteration of the books, relied upon as a conversion of the property, is alleged to have been made on or about that date. Beatrice S. Rose was appointed executrix of the decedent's estate July 5, 1927. A decree of distribution was entered in the estate September 26, 1929, distributing to plaintiff herein an undivided one-half interest in all the estate of said deceased, including the cause of action sued upon herein. Plaintiff did not arrive at the age of majority until June 11, 1931. He alleged in his second amended complaint that he did not learn of the alleged conversion of the stocks by defendant until about the month of October, 1931. He instituted this action June 8, 1932. The time elapsing between the date of the conversion and the entry of the decree of distribution was two years, three months, sixteen days. The time elapsing between the date when plaintiff became of age and the institution of the action was eleven months, twenty-seven days. These two periods, combined, give a period of three years, three months and thirteen days, or three months and thirteen days beyond the statutory period.

It is the contention of appellant that the statute did not commence to run until the month of October, 1931, at which time plaintiff first learned that the stocks were not held in joint tenancy during the life of Emmason C. Rose and of the alleged alteration of defendant's books. The contention of respondent, accepted by the trial court, is that the statute commenced to run on the date of the conversion, June 10, 1927; that if it was tolled at all, it could only have been between the date of the decree of distribution and the date of plaintiff's attaining his majority, and that it would run again from the latter date to the date of the commencement of the action. Respondent does not concede that the running of the statute was suspended

at any time, but we deem it unnecessary, under the views we entertain, to discuss the argument advanced upon that point. We think it admits of no doubt that the statute commenced to run on the date of the alleged conversion; that if interrupted at all during the period of plaintiff's minority after the decree of distribution was entered, it was again put in motion when plaintiff became of age.

The precise question whether in an action for conversion of personal property, by one who has come into its possession lawfully, the statute commences to run at the time of the conversion, or only when the owner of the property acquires knowledge of the acts constituting the conversion, has not been decided by our appellate courts.

[2,3] As a rule, statutes of limitation commence to run when a cause of action is complete. There are well-recognized exceptions to the rule. But the fact that the injured party is without knowledge of the wrong committed, while bringing a case within the exceptions generally recognized in cases of fraud and fraudulent concealment of facts, does not generally toll the statute. A cause of action is not suspended merely because a party is ignorant of the fact that he has a cause of action or of the identity of the one who committed a certain act. *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093; *Lambert v. McKenzie*, 135 Cal. 100, 67 P. 6; *Medley v. Hill*, 104 Cal. App. 309, 285 P. 891.

As applied to the case before us, the general rule is stated in 17 Ruling Case Law, 765, as follows: "The general rule seems to be that where an action is founded merely on a wrongful conversion of goods, the statute of limitations begins to run from the time of the conversion, although it was not discovered by the plaintiff until a later period, the defendant not being shown to have been guilty of a fraudulent concealment of the conversion." In other jurisdictions, where the question has been decided, it has been held quite generally that the running of the statute is not affected by the fact that the owner was ignorant of the conversion. *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. S. 681; *Seymour v. Mechanics & Metals Nat. Bank*, 199 App. Div. 707, 192 N. Y. S. 588; *Yore v. Murphy*, 18 Mont. 342, 45 P. 217; *Stockmen's State Bank v. Merchants' & Stockgrowers' Bank*, 22 Ariz.

354, 197 P. 888; *Johnson v. White*, 13 Smedes & M. (Miss.) 584.

Upon the authority of *Latta v. Tutton*, 122 Cal. 279, 54 P. 844, 68 Am. St. Rep. 30, *Estate of Rathgeb*, 125 Cal. 302, 57 P. 1010, and *Esponda v. Kelly*, 57 Cal. App. 766, 207 P. 939, appellant asks us to hold that in an action based upon conversion the statute of limitations does not commence to run until the discovery of the acts constituting the conversion.

In *Latta v. Tutton* the action was filed within three years after defendant first claimed ownership of the property, and the question of plaintiff's knowledge was not involved. In *Estate of Rathgeb* and *Esponda v. Kelly* the only acts of conversion shown consisted of a refusal by the party in possession to surrender the property, upon demand, to the rightful owner. It therefore necessarily followed that the statute commenced to run at the time of the refusal, which alone was the act of conversion.

It has been decided by our Supreme Court that a cause of action for conversion of personal property arises immediately upon the commission of the acts of conversion. *Bell v. Bank of California*, 153 Cal. 234, 94 P. 889. We believe there is no good reason for holding that the statute is not immediately set in motion. The case does not differ in principle from the general run of actions for the invasion of property rights, and the authorities so holding seem to be quite uniform. In the present case the cause of action arose on or about June 10, 1927, when the defendant is alleged to have altered its records in such a manner as tended to defeat the title of the estate and create an ownership of the stocks in the surviving joint tenant. The statute ran against the estate and consequently against those who took from the estate at least until the date of distribution, and, in any view, it ran also between the date plaintiff became of age and the date the action was commenced, and, as we have seen, the total of these two periods was in excess of three years. The action was therefore barred some three months before it was commenced.

[4] Plaintiff tendered a third amended complaint and applied for leave to file it after the demurrer was sustained to the second amended complaint without leave to amend. The application was denied. In

this the court committed no error, as the facts upon which we have expressed our views are also set forth in the proposed third amended complaint. It is unnecessary to discuss other questions raised by the demurrer and presented in the briefs of counsel.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 463

**BANK OF ITALY NAT. TRUST & SAVINGS
ASS'N v. JOHNSON et al.**

**JOHNSON et al. v. BANK OF ITALY NAT.
TRUST & SAVINGS ASS'N et al.**
Civ. 1345.

District Court of Appeal, Fourth District,
California.

June 7, 1935.

**Hearing Denied by Supreme Court
Aug. 5, 1935.**

1. Evidence ⇨215(3)

Letter written by member of lessee partnership to officer of lessor bank stating lessee's situation respecting leased hotel property and giving value of hotel furniture and equipment was admissible on question of value thereof as declaration or admission and was not merely an impeachment or offer of compromise (Code Civ. Proc. §§ 1870, 2078).

2. Evidence ⇨601(4)

Evidence held sufficient to sustain finding of value of hotel furniture and fixtures in action by lessor of hotel, as mortgagee of furniture and fixtures, for balance remaining due after sale thereof and application of proceeds to rentals.

3. Evidence ⇨215(3)

Letter written by managing partner in course of partnership hotel business wherein managing partner stated value of hotel furniture and equipment held binding upon copartner as admission.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the Bank of Italy National Trust & Savings Association against C. A. Johnson and another, and cross-action by C. A. Johnson and another against the Bank of

Italy National Trust & Savings Association and others. From the judgment, C. A. Johnson and Roy Newberry, defendants in the first action, appeal.

Affirmed.

C. L. Claflin and J. R. Dorsey, both of Bakersfield, for appellants.

Borton & Petrini, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

The appellants were the lessees of property in Bakersfield known as the Southern Hotel. The respondent bank owned this property and held a chattel mortgage on the furniture and fixtures therein as security for rents. The respondents sold the furniture and fixtures under the chattel mortgage and, after applying the proceeds to the rentals due, brought this action to recover the balance. The appellants filed a cross-complaint alleging a conversion of the property sold and asking judgment for the value of the same. They also filed a separate action to the same effect. The two actions were tried together and have been consolidated on this appeal.

The court found that the sale under the mortgage was void and that the respondents were liable to the appellants for the value of the property sold. After applying the amount found to be the value of the property to the amount of the rents due, judgment for the balance was entered in favor of the respondents and this appeal followed.

[1, 2] The main contention is that the evidence is not sufficient to sustain a finding that the value of the property sold was \$12,000. In this connection it is argued that there is nothing in the record to show such a value except a letter written by the appellant Newberry to an officer of the respondent bank, that the court erred in admitting this letter into evidence, that even if the letter were admissible its only effect was to impeach Newberry's testimony giving a higher value to the property, and that, in any event, the letter was not binding upon the appellant Johnson. The letter in question reviews at length the situation with respect to the hotel and the difficulties the appellants were having in running the same, in view of the fact that two newer hotels had been opened in that city, and asks for an interview for the purpose of going into the matter more in detail and "to discuss some plan for the future." In this letter the following statement was made: "The assets of the

copartnership are hotel furniture and equipment of a problematical value of from \$8,000.00 to \$12,000.00 subject to a chattel mortgage to the lessors as surety for the lease."

It is argued that this letter was an offer of compromise and was inadmissible under section 2078 of the Code of Civil Procedure. A reading of the letter discloses beyond question that it was not an offer of compromise, that there was no dispute as to the amount due, and that nothing was offered in compromise or otherwise. It merely reviews some of the facts in connection with the business and asks for a conference with respect to what might be done in the future. The situation here is somewhat similar to that in the case of Fink & Schindler Co. v. Gavros, 83 Cal. App. 582, 257 P. 156, where the court said: "The appellants also claim that the trial court erred in receiving evidence of an attempt to compromise the dispute. The vice in this contention is that the trial court did not do so. The parties met and discussed the items of the account. Some of the statements made by the respective parties were received in evidence. A matter of compromise was not suggested nor attempted, and no evidence on that subject was received."

The statement of value made in this letter was not merely an impeachment of other testimony, but was, in itself, a declaration or admission of a party which was some evidence on the question of value. Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827; Code Civ. Proc. § 1870.

The court took the highest valuation placed on this personal property by the appellant Newberry in this letter and this is sufficient to sustain the finding in question.

[3] The contention that this evidence was not binding upon the appellant Johnson is without merit. The appellants were copartners in the business of running this hotel, and it not only appears that the letter was written in the course of the partnership business, but the articles of copartnership provide that the appellant Newberry shall act as manager of the business of the copartnership. Without question the matter of paying the rent and negotiations concerning the same was a part of the partnership business.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

7 Cal.App.2d 65

CALISTOGA NAT. BANK v. CALISTOGA VINEYARD CO., Limited, et al.

Civ. 5210.

District Court of Appeal, Third District,
California.

May 18, 1935.

As Modified on Denial of Rehearing June 17,
1935.Hearing Denied by Supreme Court
July 17, 1935.**1. Limitation of actions** ⇨15

Promise of bank which had charged forged checks paid by bank to depositors' account, that bank would take into consideration allowance of credit on depositors' note of aggregate sum of forged checks or would credit that amount on note when note was paid, was waiver of limitations applicable to action to recover from bank sum paid on forged checks, provided other necessary elements of equitable estoppel were also present (Code Civ. Proc. § 340, subd. 3).

2. Banks and banking ⇨148(3)

Depositors who notified bank that forged checks had been charged to their account within thirty days of forgeries and within few days after their discovery of forgeries *held* not to have waived right to demand reimbursement against bank by their failure to promptly notify bank of forgeries immediately on receipt of bank's statement, which included such charges against their account, where forged checks had then all been paid and bank was not harmed by lack of more prompt notice (Code Civ. Proc. § 340, subd. 3).

3. Banks and banking ⇨154(7)

In bank's suit on note in which makers counterclaimed for amount of forged checks which were paid by bank and charged to makers' account, refusal to permit makers to introduce evidence in support of affirmative defense of equitable estoppel by waiver of statute of limitations for commencement of action to recover amount of forged checks *held* error, where makers alleged that payment of forged checks had been promptly called to bank's attention, and that bank had waived limitation statute by agreeing to credit on note amount of forged checks when note was paid (Code Civ. Proc. § 340, subd. 3).

4. Banks and banking ⇨154(8)

In bank's suit on note in which makers counterclaimed for amount of forged checks which were paid by bank and charged to makers' account, finding that bank had not agreed to take into consideration the forged checks when note was paid *held* error where evidence was uncontradicted that bank did so agree.

5. Banks and banking ⇨154(2)

In bank's suit on note in which makers counterclaimed for amount of forged checks which were paid by bank and charged to makers' account, finding that makers' cause of action for amount of forged checks was barred by limitation statute *held* error where court had erroneously refused to permit makers to prove affirmative defense of equitable estoppel by waiver of statute of limitations for commencement of action to recover sum of forged checks wrongfully paid by bank from makers' account (Code Civ. Proc. § 340, subd. 3).

6. Banks and banking ⇨154(6)

In bank's suit on note in which makers filed counterclaim in which they alleged that they were entitled to credit for amount of forged checks which were paid by bank and charged to makers' account, makers had burden of proving knowledge of bank of wrongful payment of forged checks, bank's intention to lead makers to believe claim would be considered without necessity of separate action to recover amount and that makers relied on bank's promise (Code Civ. Proc. § 340, subd. 3).

7. Estoppel ⇨55

When act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, promisor is estopped from taking advantage of act or omission of promisee on ground of equitable estoppel.

8. Limitation of actions ⇨15

Promisor is estopped to repudiate promise to waive statute of limitations which had been acted on, notwithstanding that promise was not in writing (Code Civ. Proc. § 1962, subd. 3).

Appeal from Superior Court, Napa County; Forrest A. Plant, Judge.

Suit by the Calistoga National Bank against the Calistoga Vineyard Company, Limited, and others, in which the defendants filed a counterclaim. Judgment for plaintiff, and defendants appeal.

Reversed.

Prior opinion, 42 P.(2d) 82.

King & King, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an opinion on rehearing. The defendants have appealed from a judgment

which was rendered against them in a suit on a promissory note. It is claimed the court erred in refusing to allow the defendants a credit on the note in the amount of \$850, which is the aggregate sum of seven alleged forged checks which were paid by the bank and charged against the defendants' account therein. The court found that the seven questioned checks were forged, and that they were charged against the account of the defendants, but precluded them from offering evidence in support of their allegation of an equitable estoppel, and held that an action against the bank, on that account, was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure.

The plaintiff is a corporation doing a banking business in Napa county, with its principal place of business at Calistoga. For several years prior to the commencement of this action, the defendants Bianchi and Forni were engaged as an association in operating a vineyard business in Napa county under the name of Calistoga Vineyard Company, Limited. The evidence indicates that on December 29, 1930, after paying the seven forged checks which are in dispute, the account of the defendants with the plaintiff bank showed a credit of \$3,481.55. The bank then held the defendants' promissory note for \$4,000, dated March 24, 1930, payable on demand, upon which there was due and remained unpaid in April, 1932, the sum of \$1,200 and interest at the rate of 7 per cent. per annum from December 8, 1932. February 8, 1932, the bank notified the defendants in writing that there was due on their note the sum of \$1,500 and accumulated interest, and requested their prompt payment thereof. March 2, 1932, the bank again notified the defendants that there was still due on the note the sum of \$1,500 and accumulated interest, and once more requested their prompt payment of the same. Subsequently the bank charged the defendants' account with the sum of \$300 and the accrued interest on the note, crediting the promissory note with that amount. April 25, 1932, the bank notified the defendants to that effect, again urging the prompt payment of the balance due on the note. The defendants received monthly statements of their account from the bank. December 19, 1930, they received a statement showing a balance to their credit of the sum of \$5,360.54. The statement contained a list

of thirty-four checks which had been paid and charged to the account during the preceding month. The defendants received another statement of their account on December 31, 1930. It showed a balance of \$9,883.66 to their credit. Eighty checks were listed in the last-mentioned statement and charged to their account. The following month another statement was received showing a balance of \$3,481.55 to the defendants' credit after charging their account with the payment of thirteen checks. These three statements were introduced in evidence. The bank statements of November and December, 1930, contained seven checks aggregating the sum of \$850, which the defendants discovered within a few days thereafter, were forged and cashed from their account by their clerk Bower. The bank was promptly notified of the payment of these forged checks. The defendant Forni testified that he was the only member of the firm authorized to draw checks against their association account; that their stubs contained no evidence of the drawing of these seven checks; and that he did not draw them, but that they had been forged. Mr. Harold Bower, who was an accountant in the office of the California Vineyard Company in 1930, testified that he withdrew in the latter months of that year from the defendants' account in the bank the sum of \$850 without authorization therefor; that this aggregate sum was represented by several checks ranging in amount for \$75 to \$200 each. He admitted that he had been previously charged by others with "forgery and peculations." He testified that these seven checks were paid to him at the bank; that they were drawn in the name of the Calistoga Vineyard Company, by either Forni or Bianchi, but he refused to say that he forged or signed their names to the checks. He said in that regard: "I refuse to state under oath whether C. B. Forni actually signed those checks or whether I forged his name on them." Bower was discharged from his employment with the defendants January 5, 1931. Mr. Forni testified that he became aware of the forgeries January 3, 1931. On the following Monday Forni went to the bank and talked with Mr. Westover, the vice president and cashier thereof, about the payment of the forged checks. This defendant testified that Mr. Westover told him "he would offset the amount of * * * these checks against the amount on your checks." He later tes-

tified that Mr. Westover said "he didn't know just what the bank's attitude would be toward * * * these forged checks"; that Westover then urged him to pay their note, and said, "The minute we were ready to take care of this \$4,000.00 note, that he would take the other matter into consideration." Periodically thereafter until December, 1932, the bank charged the defendants' account with payments of interest due on their promissory note and credited the sums to the note, informing them in writing of each transaction. No objection was ever made to these payments of interest. February 15, 1933, the president of the bank wrote the following letter to the defendants regarding the payment of the note and the forged checks:

"In connection with your loan. At the time you called at my house with regard to this matter about a month ago you advised, on leaving, that you would take the matter up again soon. We have not heard anything further since that time.

"We now insist that this note be taken care of as it is long past due. If there is some adjustment, legally, due you gentlemen on account of that supposed forgery we will take that up as a separate matter and are perfectly willing to consider it in every angle from the legal standpoint. The note, however, was a separate obligation to be paid long ago. * * *

[1] Mr. Rocca, the president of the bank, first testified that he was present and overheard the conversation between Forni and Westover on the Monday following January 3, 1931. He testified that Westover told him "Forni says that Bower has forged some checks on the Vineyard Company's account." When Rocca asked where the checks were, Forni replied that they seemed to be lost. On rehearing, our attention is called to the fact that the president later testified, "I was not present at the conversation on Jan. 5, 1931, between Mr. Bianchi, Mr. Forni and Mr. Westover." There is no other evidence on this subject. Mr. Westover was not called as a witness at the trial of the case. The evidence is therefore undisputed to the effect that the defendants notified the bank of the forgeries on the last-mentioned date, and that the vice president then told them either that the bank would "take into consideration" the allowance of credit on the note of the aggregate sum of the forged checks, or that it would actually credit that amount on the

note when it was paid. The subsequent letter of the president, dated February 15, 1933, is not in conflict with the preceding statement of the vice president with respect to the evidence that until the conference with the president in February, 1933, the defendants were led to believe that it was not necessary for them to commence a suit against the bank to recover the money paid from their account on the forged checks, for they would be taken into account when the note was paid. No date was fixed by the bank for the payment of the note. It did not outlaw until March 24, 1934. This promise of the bank, in effect, was a waiver of the statute of limitations applicable to the statutory time for commencing suit to recover from the bank the sum paid on the forged checks, provided the other necessary elements of an equitable estoppel were also present.

Suit was commenced in April, 1933, on the defendants' promissory note to collect the balance of \$1,200 and interest which was due thereon. The defendants answered the complaint, admitting the execution of the \$4,000 note, and the payment of \$2,800 on account thereof, but affirmatively alleged, as a matter of defense, that the bank had wrongfully paid and charged to their account seven forged checks aggregating the sum of \$850, and that Mr. Westover, the vice president, on January 5, 1931, agreed to credit the last-mentioned sum on the defendants' note, but failed to do so; that the defendants, relying on that promise, failed to commence an action against the bank to recover the sum of money paid on the forged checks within the statutory period of time allowed therefor, but that the plaintiff was estopped by its promise and conduct from setting up the statute of limitations on the last-mentioned defense.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in which the court held that the seven checks aggregating the sum of \$850 were forged and that they were paid by the bank and charged to the account of the defendants therein, but that the defense to the note on that account was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure. Judgment was thereupon rendered for the unpaid portion of the promissory note in the sum of \$1,200 together with interest there-

on from December 8, 1932, at the rate of 7 per cent. per annum. From this judgment, the defendants have appealed.

There is an abundance of evidence to support the finding of the court that the seven checks aggregating the sum of \$850 were forged; that they were wrongfully paid by the bank and charged to the account of the defendants, and that the forgeries were promptly called to the attention of the bank.

[2] We are of the opinion the defendants did not waive their right to demand reimbursement against the bank for erroneously paying from their account the forged checks by failure to promptly notify the bank of the forgeries immediately upon receipt of their bank statement which included these charges against their account. Daniel on Negotiable Instruments (5th Ed.) p. 387, § 1370. It appears that the defendants did call the attention of the bank to the forgeries and the erroneous payments of those checks within thirty days thereafter, and within a few days after they had discovered the forgeries. The forged checks had then all been paid, and the bank was not harmed by a lack of more prompt notice thereof.

[3] The court erred in sustaining objections to the effort on the part of the defendants to prove their affirmative defense of equitable estoppel. As a counterclaim, they alleged they were entitled to a credit of \$850 on the balance for which they had been sued on their promissory note. It was also alleged that the payment of the forged checks had been promptly called to the attention of the bank and that it waived the provisions of section 340, subdivision 3, of the Code of Civil Procedure, by then agreeing to credit on their note the sum of these forged checks when the note was paid. This pleading properly raised the issue regarding the alleged waiver of the statute of limitations, which the defendants were entitled to prove, if possible, as an offset to the balance of the note which the plaintiff claims was due.

[4] The court also erred in finding that the plaintiff did not agree to "take into consideration" the forged checks, when the note was paid. The evidence is contradicted to the effect that the bank did promise to do so. This finding is therefore not supported by the evidence.

[5] It follows that since the court precluded the defendants from introducing evidence in support of their affirmative defense of equitable estoppel by waiver of the statute of limitations for the commencement of an action to recover the sum of the forged checks which were wrongfully paid by the bank from the defendants' account, the court also erred in finding "that the several counterclaims set out in the answer, and each of them, are barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure."

[6, 7] In proof of the affirmative defense of equitable estoppel, it was necessary for the defendants to establish several elements including knowledge on the part of the bank of the wrongful payments of the forged checks, intention on its part to lead the defendants to believe their claim for a credit of the amount of the forged checks on their note would be considered without the necessity of commencing a separate suit to recover that sum, and that the defendants relied upon that promise of the bank. 10 Cal. Jur., p. 626, § 14; 2 Pomeroy's Eq. Jur. (4th Ed.) p. 1643, § 805. The effort on the part of the defendants to prove these facts was erroneously excluded by the court. In effect the defendants claim to have been induced by the promise of the bank to take the forged checks into consideration when their note was paid, to forbear from commencing a separate suit to recover the aggregate sum of those forged checks until after the statute of limitations had run on that separate action. It is a well-established rule of law that when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promisor is estopped from taking advantage of the act or omission of the promisee. The violation of such a promise amounts to fraud and estops the promisor from repudiating the agreement on the doctrine of equitable estoppel. In the case of Quanchi v. Ben Lomond Wine Company, 17 Cal. App. 565, 120 P. 427, the text in 1 Wood on Limitations (2d Ed.) § 76, is quoted with approval, as follows:

"While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay

it, yet if made before the debt is barred and in consideration of the forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period dated from such promise expired * * * by way of estoppel."

[8] Nor is it necessary that the promisor shall sign a written agreement to waive the statute of limitations to bar him from subsequently repudiating his agreement. *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344. The authorities are uniform to the effect that the conduct of a promisor, or even his silence under certain circumstances may result in an equitable estoppel. Section 1962, subd. 3, Code Civ. Proc.; *Verdugo Canon Water Co. v. Verdugo*, 152 Cal. 655, 93 P. 1021, 1033. In the last-cited case it is said:

"An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped. * * * An estoppel may arise from silence as well as words."

In 2 *Pomeroy's Equity Jurisprudence* (4th Ed.) page 1669, § 812, it is said in that regard:

"Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action. Finally, this action must be of such a nature that it would have altered the legal position of the party for the worse, unless the estoppel is enforced. He must have placed himself in such a situation that he would suffer a loss as the consequence of his action, if the other party were allowed to deny the truth of his representation, or repudiate the effects of his conduct. Although this action is usually affirmative, yet such affirmative action is not indis-

pensable. It is enough if the party has been induced to refrain from using such means of taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss."

The very gist of the defendants' plea of equitable estoppel was to show that they relied on the plaintiff's promise to take in consideration the allowance of the forged checks as a credit on their note when it was paid, and relying on that promise, that they failed to commence a separate action to recover the amount of those checks within the time allowed by the statute of limitations. This evidence they sought to prove, but were prevented from doing so by the erroneous ruling of the court.

While it is true that the evidence is uncontradicted to the effect that the plaintiff's agent agreed to either allow the defendants' claim based on the forged checks as a credit on their note, or take the payment of those checks in consideration when the note was paid, the evidence of other necessary elements of equitable estoppel was excluded, and this court is therefore without proof upon which it may be permitted to deduct from the balance found by the court to be due on the promissory note, the amount of the forged checks which were paid by the bank from the defendants' account.

For the reason that the court erred in the adoption of its findings, and in excluding evidence respecting the affirmative defense of equitable estoppel, as above stated, the judgment is reversed.

We concur: PLUMMER, J.; PULLEN, P. J.

PER CURIAM.

The opinion specifically states that the defendants notified the bank of the forged checks on Monday following January 3, 1931, and that these forged checks were contained in the statements of November and December, 1930, which were furnished to the defendants. There is therefore no substantial merit in the respondent's criticism of the court's statement of facts.

The petition for rehearing is therefore denied.

7 Cal.App.2d 204

LOWENBRUCK v. STIGLMEIER et al.
Civ. 8619.District Court of Appeal, Second District,
Division 1, California.
May 27, 1935.**1. Automobiles ☞246(9)**

In action for injuries sustained when plaintiff, driving automobile south along west roadway of boulevard having two roadways, separated by strip of land, and used for both north and south traffic, made left turn at cross street and collided with southbound automobile on east roadway, instruction to effect that boulevard formed two intersections with cross street *held* error, since there was but one "Intersection" which was the area bounded by prolongation of curb lines along the two streets.

[Ed. Note.—For other definitions of "Intersect; Intersection," see Words & Phrases.]

2. Automobiles ☞246(9)

In action for injuries sustained when plaintiff driving automobile south along west roadway of boulevard having two roadways separated by strip of land made left turn on cross street and collided with southbound automobile on east roadway, instructing that rights of parties depended on time each entered intersection of easterly roadway and cross street, and refusal to instruct as to duty of one making left turn *held* error, since care required of plaintiff was that of one entering intersection and making left turn.

3. Automobiles ☞246(47)

In action for injuries sustained when plaintiff driving automobile south along west roadway of boulevard having two roadways separated by strip of land made left turn on cross street and collided with southbound automobile on east roadway, instruction that plaintiff's right to recover depended on whether he entered intersection when signal directed traffic to proceed in easterly direction *held* error, since evidence failed to show signal displayed for such traffic at any particular time and plaintiff's right of recovery did not depend on such signal.

4. Appeal and error ☞1064(1), 1067

In intersection collision case where, had court correctly instructed jury on law applicable to situation, verdict in favor of appellant would have been supported by evidence, giving of certain erroneous instructions and refusing of other correct ones *held* reversible error.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Peter C. Lowenbruck against Maria Stiglmeier and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Frankley & Spray, of Los Angeles, for appellants.

Richard A. Dunnigan, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff recovered judgment upon the verdict of a jury for personal injuries sustained in an automobile collision. The points presented on appeal concern only instructions given and refused.

The accident occurred in the intersection of 48th street with Crenshaw boulevard in the city of Los Angeles. Crenshaw boulevard runs in a general northerly and southerly direction, having two roadways each approximately 59 feet in width. These roadways are each used for both north and south travel, and they are separated by a strip of land 33 feet in width on which street car tracks are laid. Each of the roadways is paved and has a curb on each side. At the time of the accident there was an automatic traffic signal at the approximate position of each of the four corners formed by the intersection of the property lines of Crenshaw boulevard and 48th street.

The evidence shows without contradiction that plaintiff drove an automobile south on the westerly roadway of Crenshaw boulevard, and entered 48th street when the signal controlling traffic in the direction he was traveling showed green, allowing him to proceed. He passed into 48th street and made a left-hand turn to the east, proceeding across the street car tracks a short distance to a point where he collided with the automobile driven by the appellant Maria Stiglmeier, who was traveling south on the easterly roadway of Crenshaw boulevard.

[1] The jury was instructed that "Crenshaw boulevard is what might be termed a double street; that is, there is a private right of way for the street cars which occupies a strip of land in what might be characterized as the middle of the street. However, the evidence discloses that this strip of land occupied by the car tracks is buttressed on each side by a cement curb. Therefore, in law, there are really two streets which constitute Crenshaw boule-

ward. Under the evidence, without dispute it appears that the collision of the two cars here involved took place somewhere in the intersection of the easterly driveway known as Crenshaw boulevard and 48th street. Hence, for the purposes of this case, whenever the word 'intersection' is used, it means the space that would be included between that portion of the intersection which would be formed by extending the curb lines of the easterly driveway of Crenshaw boulevard in a northerly and southerly direction across 48th street. Where in these instructions, and particularly the provision of the Motor Vehicle Act which I have read to you, the term 'intersection' is used, it will mean the space I have just indicated and will not include that intersecting space which would be formed by the extension of the curb lines of the westerly driveway of Crenshaw boulevard with 48th street." This instruction was erroneous. Under the facts shown in evidence there was but one intersection, which was the area bounded by the prolongation of the curb lines along the two streets. *Kienlen v. Holt*, 106 Cal. App. 135, 138, 288 P. 866.

[2,3] In conformity with the view of the trial court that there were two intersections, the jury was instructed that the rights of the plaintiff and defendant were to be determined with relation to the times each entered the area "which would be formed by extending the curb lines of the easterly driveway of Crenshaw boulevard in a northerly and southerly direction across 48th street." This was incorrect, as plaintiff was making a left-hand turn in an intersection which he entered when he crossed the northerly curb line of 48th street prolonged across the westerly roadway of Crenshaw boulevard. The amount of care required of one entering an intersection by authority of the traffic signals and proceeding across the intersection is quite different from that required of one who so enters and makes a left-hand turn. *Donat v. Dillon*, 192 Cal. 426, 430, 221 P. 193. The court therefore erroneously refused the defendants' requested instructions concerning the duty of one making a left-hand turn, and was also in error in instructing the jury that plaintiff's right to recover depended upon whether or not he entered the intersection "at such time the signal was on for traffic to proceed in an easterly direction." There is no evi-

dence to show the signal displayed for this traffic at any particular time, and under the evidence it should not have been considered by the jury in determining plaintiff's rights.

[4] Two other instructions given are conflicting and it is impossible to say which one the jury followed in reaching its verdict. It was for the jury to find from the facts which driver, if either, was negligent, and it could only perform this duty under instructions which correctly presented the law applicable to each of the parties at the time and place of the accident. Had the jury been instructed that there was only one intersection and that the care required of each driver was to be determined according to the rules of law fixing the rights and duties of those driving vehicles therein, a verdict in favor of the defendants would be supported by the evidence. Under such circumstances the action of the court in giving certain of the instructions and refusing others was prejudicial to the rights of the defendants.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



WALLACE RANCH WATER CO. v. FOOT-HILL DITCH CO. *

Civ. 1375.

District Court of Appeal, Fourth District,
California.

May 28, 1935.

Rehearing Denied June 27, 1935.

Hearing Granted by Supreme Court

July 25, 1935.

1. Judgment ☞704

Judgment in prior action respecting water rights brought against plaintiff's predecessors and defendant's predecessor was not res judicata where it was not shown that predecessors were adversaries.

2. Trial ☞395(1)

Incorporation of stipulation and judgment in action brought against plaintiff's predecessors and defendant's predecessor into findings of fact in subsequent case made

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 929.

recitals of stipulation and judgment findings of fact in subsequent case.

3. Trial ↪398

Where two findings on essential fact at issue are conflicting, findings cannot support judgment and judgment must be reversed on appeal.

4. Trial ↪398

In action to quiet title to water diverted from river and to interest in diversion ditch, where there was conflict between facts particularly found by trial court and those incorporated in findings by including therein stipulation and judgment in prior action brought against plaintiff's predecessors and defendant's predecessor, judgment for plaintiff was reversed as unsupported by findings.

Facts found from prior action showed that there were two separate diversion ditches and that defendant's predecessor owned all of new ditch without easement and that defendant's predecessor owned two-thirds and plaintiff's predecessors one-third of old ditch with right in plaintiff's predecessors to flow three cubic second feet of water through it. Facts particularly found were that there never had been but one ditch, and that plaintiff and its predecessors owned easement therein to flow three cubic second feet of water through it.

5. Waters and water courses ↪257(1)

Judgment requiring defendant to flow plaintiff's water through diversion ditch at charge for maintenance rather than at rates imposed by formal order of Railroad Commission held erroneous, since Superior Court had no jurisdiction to indirectly annul order of Railroad Commission even though order was rendered without jurisdiction (St. 1915, p. 161, § 67).

6. Waters and water courses ↪140

Where plaintiff's right to divert three cubic second feet of water was equal and not superior to defendant's right to divert six cubic second feet, judgment recognizing plaintiff's right to divert three cubic second feet and enjoining defendant from interfering therewith held improper as making plaintiff's right superior to defendant's in years when there were not nine cubic second feet of water in river subject to diversion.

pany. From a judgment for plaintiff, defendant appeals.

Reversed.

McFadzean & Crowe, Farnsworth, Burke & Maddox, and James K. Abercrombie, all of Visalia, for appellant.

H. B. McClure, of Visalia, and Freston & Files and James A. McLaughlin, all of Los Angeles, for respondent.

MARKS, Justice.

This is an action to quiet title to 3 cubic feet of water per second diverted by plaintiff from the Kaweah river, and a one-third interest in the ditch by which the water is conveyed from the diversion point to what was known and to which we will refer as the Wallace ranch. The answer admits the ownership of the water right and the right to have the water diverted from the river and flowed through the ditch by defendant, but disputes any ownership in the ditch by plaintiff and any interest in it other than that first mentioned. The plaintiff is a mutual water company and the defendant is a public utility under the jurisdiction of the Railroad Commission.

Defendant presents three grounds for a reversal of the judgment: (1) A conflict in the findings of fact; (2) the question of the jurisdiction of the Superior Court to nullify an order of the Railroad Commission (section 67, Public Utilities Act, St. 1915, pp. 115, 161); (3) the failure of the trial court to pass upon defendant's right to divert 6 cubic second feet of water as equal with plaintiff's right to divert 3 cubic second feet from the Kaweah river.

A proper understanding of the questions here presented requires a somewhat careful summary of the evidence. As is not unusual in cases involving water rights which originated in the early years of California's statehood, where the original actors are dead, and the historical facts have to be very largely gleaned from the memory of those not their contemporaries, some uncertainty appears in the sequence of the events involved. We have carefully studied the testimony of the witnesses and the voluminous exhibits and believe that we have gained a fairly accurate conception of the events in the proper sequence of their happenings.

About the year 1857, John Swanson owned land in what is now Tulare county and which was riparian to the Kaweah riv-

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by the Wallace Ranch Water Company against the Foothill Ditch Com-

er, and by means of a ditch diverted water from the river which he put to beneficial use on his property. Shortly after 1863 the land, ditch, and water rights were acquired by J. W. C. Pogue, W. H. Wallace, and C. W. Crocker as tenants in common. In 1875 they enlarged the ditch, which became known as the "Pogue, Wallace and Crocker Ditch," and increased the amount of water appropriated and put to beneficial use. In 1877 they constructed a dam in the channel of the river, just below the head of this ditch, to maintain the flow of water they had been diverting. This diversion dam remained intact in the river until the early part of 1890.

Prior to November 2, 1883, J. W. C. Pogue acquired the one-third interest of C. W. Crocker in the land, ditch, and water rights. W. H. Wallace had died and Emeline Wallace was the duly appointed, qualified, and acting administratrix of his estate. J. W. C. Pogue brought an action against the administratrix and the heirs at law of the deceased, and a decree of partition was rendered on November 2, 1883. The land and water was divided between the parties and the decree confirmed the report of the referees appointed to partition the property. In this report we find that the lands allotted to Pogue were to be "charged with the servitude hereinafter specified." The report then proceeded to set apart a portion of the property to the defendants and provided that "said referees have further set apart and allotted to the said defendants Emeline Wallace, Cora A. Wallace and William Henry Wallace, and as appurtenant to said lands allotted to them as aforesaid, a perpetual easement and right of way, on and across said lands allotted to J. W. C. Pogue as aforesaid to flow and convey over and across the same and in said water ditch, one-third of all the water appertaining to the said ditch or which the said ditch may lawfully divert from said Kaweah River." The decree of partition contains the following: "And it is further ordered, adjudged and decreed that said defendants, Emeline Wallace, Cora A. Wallace and William Henry Wallace are the owners, as appurtenant, to said lands last above described, of a perpetual easement and right of way, on and across the said lands hereinbefore adjudged and allotted to said plaintiff J. W. C. Pogue, to flow and convey over and across the said lands, in that certain irrigation ditch, situate thereon and referred to in said Referees' report, one third of all the water ap-

purtenant to said ditch, and which said ditch may lawfully divert from the Kaweah River."

Plaintiff derives its title to its water right and interest in the ditch from Emeline, Cora A., and William Henry Wallace; and defendant derives its title from J. W. C. Pogue, each through various mesne conveyances. Up to, at least, 1890 the ditch was called the "Pogue, Wallace and Crocker Ditch."

In 1890 the dam across the river was blown out. Pogue proceeded to construct another intake for the ditch. He went down stream about 600 feet and built another dam, dug through the river bank into a slough which was sometimes referred to as an old bed of the river, dammed the slough about 1200 feet from the opening, and diverted the water into a new ditch which extended southwesterly for about half a mile where it joined the Pogue, Wallace and Crocker ditch. Thereafter Pogue and his successors in interest diverted their water from the Kaweah river through this ditch. Defendant maintains that this new ditch and its subsequent extensions to the Wallace ranch has always been known as "Pogue's Lower Ditch" to distinguish it from the original Pogue, Wallace and Crocker ditch.

Just how the Wallace ranch owners obtained their water for several years after 1890 is not at all clear from the record. We gather and will assume from the testimony of C. E. Goodale, who was superintendent (lessee part of the time) of the Wallace ranch from 1895 to 1926, that it was taken out at the old Pogue, Wallace and Crocker heading and through the old Pogue, Wallace and Crocker ditch until 1896. In that year this dam was blown out and thereafter their water was taken from the river through the new Pogue heading and the $\frac{1}{2}$ mile of new ditch which Pogue had constructed. Goodale testified: "I was friendly with Pogue and I arranged with him to take it out there." Portions of the old Pogue, Wallace and Crocker ditch were visible at the time of the trial in 1931, but after 1896 it is probable that no water had been conveyed through that portion of it above its junction with the new ditch constructed by Pogue.

By stages, and between 1896 and probably about 1906, the new ditch, the first half mile of which Pogue had constructed in 1890, was continued as a ditch separate

from the old Pogue, Wallace and Crocker ditch, to a point about 300 yards into the Wallace ranch property where it joined the old ditch which, at the time of the trial, continued through the Wallace ranch in about its original location and had been continued several miles beyond the boundaries of the Wallace ranch. By 1914 the new ditch had been replaced with a flume which was generally constructed in or over the ditch except in one place when a broad curve was eliminated. There is no showing that the plaintiff or its predecessors in interest contributed anything towards building the new ditch and flume. They were not charged anything for flowing their water through it for a number of years.

Plaintiff maintains that the new ditch was known indiscriminately as the "Pogue, Wallace and Crocker Ditch," "Pogue's Lower Ditch," and the "Foothill Ditch." Defendant maintains that it was known as "Pogue's Lower Ditch," "Bonnie Brae Ditch," and the "Foothill Ditch" and never as the "Pogue, Wallace and Crocker Ditch," which, according to its contention, was the exclusive name of the original ditch constructed by the three joint tenants whose names it bears.

Defendant maintains that the partition decree of 1883 gave plaintiff's predecessors in interest an easement in the old original Pogue, Wallace and Crocker ditch and in this alone; that there is no easement in the new ditch and that plaintiff has no property or interest in it other than the right to require defendant to divert 3 cubic feet a second of water from the Kaweah river and flow it through the new ditch to the Wallace ranch lands; that as it is a public utility plaintiff must pay the charges fixed by the Railroad Commission for these services. We do not understand that defendant contends that plaintiff cannot require it to divert the water from the Kaweah river and convey it to the Wallace ranch properties.

Plaintiff contends that it is the owner of an easement in the new ditch and that it can flow its water through that ditch and is, or may be, liable for one-third of the cost of its maintenance and operation. It maintains that the new ditch is a change of location of the old one which was made gradually over a period of years for the convenience of defendant and its predecessors in interest and that

plaintiff is the owner of an easement in the new ditch. From this premise, plaintiff argues that as it is not a public utility the Railroad Commission has no jurisdiction and no right to impose a charge upon plaintiff for conducting its own water through its own right of way. The trial court generally found in accordance with plaintiff's contentions and rendered judgment accordingly.

Whether there were two separate ditches or only one which was merely a relocation of the first ditch is of vital importance to a settlement of this portion of the controversy between the parties. The names by which the new ditch as well as the original ditch were known must have an important bearing on its ultimate determination.

The parol evidence in the record is in conflict on the name bestowed on the new ditch. The documentary evidence is illuminating. The deed from Cora Wallace Morton (formerly Cora A. Wallace and who acquired the interests of Emeline and William Henry Wallace) and James H. Morton, her husband, to plaintiff, dated October 17, 1907, contains the following: "Also all the right, title and interest which the said parties of the first part or either of them have in or to those certain ditches known as the Pogue, Wallace & Crocker Ditch; the ditch known as Pogue's Lower Ditch; and the ditch known as and called the Bonnie Brae Ditch; or the ditch of the Central Water and Irrigation Company. Together with all water and water rights in the waters of the said Kaweah River owned by the parties of the first part or either of them, by reason of the ownership by said parties of the first part, or either of them of any interest in the said ditches above named or either of them, or of the waters diverted by said ditches or either of them." The Central Water & Irrigation Company was a predecessor in interest of defendant. The first document in defendant's chain of title after the partition decree of 1883 is a deed from J. W. C. Pogue to Edward Records dated May 29, 1906. This deed contains the following: "And the said party of the first part doth hereby sell, assign, transfer and convey unto the said party of the second part all the right, title, interest and estate of the party of the first part, in and to that certain water ditch known as Pogue, Wallace and Crocker Ditch, and

sometimes known as 'Pogue's Lower Ditch,' which said ditch commences in the Kaweah River. * * *

In it are also repeated phrases similar to the following: "Also, all that portion of the north-west quarter of said section two, in township eighteen south, range twenty seven east, lying north of the south bank of said Pogue, Wallace and Crocker Ditch, also called 'Pogue's Lower Ditch.'" The description of the ditch as the "Pogue, Wallace and Crocker Ditch," sometimes known as "Pogue's Lower Ditch," is repeated with immaterial variations in the following exhibits introduced by defendant in tracing its chain of title: Deed dated April 6, 1906, Edward Records to Central California Water & Irrigation Company; deed of trust dated July 16, 1906, Central California Water & Irrigation Company to Mercantile Trust Company as trustee; deed dated April 11, 1913, of H. B. McClure, commissioner on foreclosure of the foregoing deed of trust, to W. J. McLean, L. J. De Sabla, and Jules Mathieu; deed dated April 14, 1913, from W. J. McLean, Jules Mathieu, and Anne Mathieu, his wife, and Leon De Sabla to H. T. Miller; deed dated June 26, 1913, from H. T. Miller and Blanche Miller, his wife, to T. M. Dungan; deed dated September 26, 1913, from T. M. Dungan to Rosa S. Spaulding; deed dated April 15, 1914, from Rosa S. Spaulding to R. C. Merryman; deed dated May 6, 1914, from R. C. Merryman and Agnes H. Merryman, his wife, to Foothill Ditch Company.

In February, 1926, the Foothill Ditch Company filed its application with the Railroad Commission seeking permission to sell its property to the Lindsay-Strathmore Irrigation District. The application contained the following: "That the ditch, right of way, water rights and appurtenances which it is sought to transfer are described as follows, to-wit: All that certain water ditch or conduit and the concrete pipe line constituting an extension thereof now known as the Foothill Ditch, and formerly known as the Pogue, Wallace and Crocker Ditch, and sometimes known as Pogue's Lower Ditch. * * *

Attached to the application is the copy of a proposed contract of sale in which the foregoing description was repeated. A list of names of "Consumers of Water from Foothill Ditch as of January 1, 1926," was also filed which does not contain the name of plaintiff. In this exhibit the following appears:

"Wallace Ranch Rights.

"The rights of the successors in title and interest of Emmaline Wallace, Cora Wallace and William Henry Wallace, as defined in a certain judgment and decree confirming report of referees, filed November 2, 1882, in a certain action then pending in the Superior Court of the County of Tulare, State of California, No. 671, wherein J. W. C. Pogue was plaintiff and Emmaline Wallace, Administratrix of the Estate of William H. Wallace, Deceased, Emmaline Wallace, Cora Wallace, William Henry Wallace, George W. Locke and Samuel Lavenson were defendants.

"Also, the rights, if any, of Cora Wallace Morton and her husband J. H. Morton, and their successors in title and interest, secured or arising out of a certain judgment dated January 26, 1904, entered in an action then pending in the Superior Court of the County of Tulare, State of California, No. 4657, wherein R. E. Hyde and the Wutchumna Water Company, a corporation, were plaintiffs, and the Kaweah Power and Water Company, J. W. C. Pogue, W. G. McVey, Harry Wilkerson and others were defendants.

"The right of Cora Wallace Morton and James H. Morton, if any, under a certain modified judgment dated July 30, 1909, and entered in an action then pending in the Superior Court of the County of Tulare, State of California, No. 4823, wherein the Consolidated Peoples Ditch Company, a corporation, was plaintiff and J. W. C. Pogue, the Kaweah Power and Water Company, a corporation, Cora Wallace Morton and James H. Morton were defendants."

We have already quoted from the decree of partition dated November 2, 1883, incorrectly given as 1882 in the foregoing quotation. We do not find in the record any judgment dated January 26, 1904, in the case of R. E. Hyde and Wutchumna Water Company v. Kaweah Power & Water Company, J. W. C. Pogue, et al. There is a judgment dated October 18, 1909, bearing the same number and with the same parties plaintiff. It appears from the judgment roll in that case that Pogue had succeeded to the interest of the Kaweah Power & Water Company and that the Central California Water Company had succeeded to the interest of Pogue and had been substituted as defendant in his place. The judgment is based on a stipulation and it is recited that the substituted de-

defendant had the right to divert from the Kaweah river, subject to diversions by the plaintiffs (Hyde et al.), 6 cubic second feet of water "through the said Pogue, Wallace and Crocker Ditch, sometimes called Pogue's Lower Ditch, at the head-gate of said Ditch." An amendment to the answer of Pogue in that case filed on February 26, 1902, contains the following allegations: "And this defendant further alleges that after the partition of said land first above described, between this defendant and his said associate, said C. W. Crocker, and the heirs at law of said W. H. Wallace, as hereinbefore stated in this paragraph of this answer, up to the commencement of this action, this defendant continued to own and use, a two third undivided interest in and to said Pogue, Wallace and Crocker ditch, and to the water diverted thereby, and that ever since the latter part of the year 1883, he has used said Pogue, Wallace and Crocker ditch, for the irrigation of three hundred acres of land." We cannot find in the record the modified judgment dated July 30, 1909, in the case of Consolidated Peoples Ditch Company v. J. W. C. Pogue et al.

In 1915 the defendant filed its application with the Railroad Commission for permission to increase its rates. The opinion of the commission contains a report of the commissioner who took evidence on the hearing. In this report the following appears: "There is one user of water, namely, C. E. Goodale, of the Wallace Ranch, who transports water through the ditch of the Foothill Ditch Company from the Kaweah River to his ranch, some three miles from the intake. For this service he pays nothing at present. Mr. Goodale has an adjudicated right to divert three cubic feet per second from the water of the Kaweah River and owns a third interest in the ditch from his ranch to the intake. I am of the opinion that Mr. Goodale should bear his proportional part of the expense of maintaining and operating the ditch." The commission ordered that \$5 per second foot per month be paid "for all water transported for use at the Wallace Ranch." It is evident that the water rights referred to in the foregoing report were not owned by Goodale, but were the property of plaintiff.

In 1921 defendant made another application to increase its rates. In the order of the Railroad Commission dated November 17, 1921, the following appears:

46 P.(2d)—17

"Carrying charge for water used at the Wallace (Goodale) ranch, per second-foot per month—6 00."

It is admitted that the owners of the Wallace ranch did not pay the transportation charges fixed by the Railroad Commission. They did pay the defendant \$150 a year, though when these payments were commenced does not appear. Plaintiff maintains that it was not made a party to these two hearings before the Railroad Commission.

In 1928, the Railroad Commission established new rates for the Foothill Ditch Company. The Wallace Ranch Water Company, and another, petitioned for a rehearing on the ground that they had been given no notice of the original hearing. In its opinion (33 Opinions and Orders of the Railroad Company, p. 237) the Railroad Commission said: "The Wallace Ranch Water Company contends that it has an adjudicated right to use three cubic feet of water per second from the waters of the Kaweah River and the right to convey said three cubic feet of water free of charge through the present Foothill Ditch a distance of approximately three miles. * * * Claiming the ownership of the above three second-feet of water, and also the ownership, as co-tenant, of a one-third undivided interest in a portion of the Foothill Ditch, the Wallace Ranch Water Company contends that the Commission has exceeded its jurisdiction in undertaking to adjudicate the question of the water rights and ditch rights of the Foothill Ditch Company and the Wallace Ranch Water Company and that the Commission furthermore has no jurisdiction to impose any charges whatsoever upon said latter company for the waters which it has received and is entitled to receive through said Foothill Ditch.

"In connection with petitioner's allegations involving the title and ownership to the ditch system and the water rights, a consideration of our Decision No. 19,964 establishing the rates involved in this proceeding fails to disclose any attempt upon the part of the Commission to adjudicate or to determine in any manner whatsoever the title to all or any part of the ditch, rights of way, or easements of the present Foothill Ditch from its point of diversion on the Kaweah River to its lower terminus. Neither has the Commission by inference or otherwise made any finding or ruling as to the title or owner-

ship of any of the waters diverted by the Foothill Ditch Company and transported through its canal system. * * *

"There is no dispute in these proceedings as to the right of the Wallace Ranch Water Company to use the three second feet of water from the Kaweah River at certain stages of said river, nor as to its right to have said water conveyed by and through the Foothill Ditch. * * * Whatever arrangements may become necessary in the future to effect a settlement between the applicant and the petitioners herein because of the latters' purported ownership of a portion of the Foothill Ditch is strictly a private matter and one subject to agreement between the contending parties or settlement in the proper courts of record in the event of a failure to amicably adjust their differences."

Receipts from the year 1914 to the year 1931 for taxes paid by defendant are in the record. In all of these receipts the following description is used: "Pogue, Wallace & Crocker Ditch which commences in Kaweah River 17 miles of ditch 1 mile of flume 6 miles fence." In the later receipts (beginning 1922), the word "Co." is inserted after the word "ditch" and "no fencing" is substituted for "6 miles fence." Also in some receipts "which commences" is omitted and in others "which com." is used.

Under date of May 29, 1923, the attorney for defendant wrote C. A. (E.) Goodale as follows: "The officers of the Foothill Ditch Company have been informed that you are planning on pumping the water at some point near the river into the Foothill Ditch and conducting it down that ditch to your lands. Of course, you understand that you have a right to convey three cubic feet of water per second through the ditch and the officers of the company are wondering whether or not you are proposing to use the ditch in excess of that right. They will not want you to do so without first seeing Mr. Merryman and making some arrangement with him in regard thereto."

The Watson Ditch Company filed an action against J. W. C. Pogue, the Kaweah Power & Water Company, Cora Wallace Morton, and J. H. Morton. The answer of J. W. C. Pogue contains the following concerning his change of the heading and the ditch in 1890 and the rights of Cora Wallace Morton therein: "That in the month of January 1890 certain parties,

unknown to this defendant at that time, and while this defendant was absent from his land and premises, unlawfully and without the knowledge of this defendant entered upon said dam and placed therein a large quantity of giant powder and exploded the same in said dam, and thereby blew a portion of said dam out of said river, and, as this defendant is informed and believes, left a large charge of giant powder in said dam, which charge so left in said dam was not exploded. That by reason of the fact that said charge of giant powder was left in said dam unexploded this defendant and his associates on account of fear of bodily injury resulting to them from the explosion of said charge of giant powder, left in said dam as aforesaid, refrained from rebuilding said dam where the same was originally placed, but thereupon changed the head of said Pogue, Wallace and Crocker Ditch to a point on the channel of said Kaweah River about one hundred yards below where the said dam was formerly located, and thereupon cut a ditch from the channel of said river for a distance of two hundred feet * * * ; that said ditch two hundred feet in length led and leads into the south or original channel of said Kaweah River, and the water so diverted into said south or original channel of said river flowed, and flows down to a point about four hundred yards from the point where said ditch entered said original or south channel of the Kaweah River; that thereupon this defendant dug and constructed a ditch leading from said lower point in said original or south channel of said Kaweah River in a southwesterly direction for a distance of about a half a mile which said last named ditch was connected with the channel of said Pogue, Wallace and Crocker Ditch at a point about three quarters of a mile below the original head of said Pogue, Wallace and Crocker Ditch as the same was enlarged by this defendant and his said associates in 1875 as aforesaid; that from the month of January, 1890, until the month of May, 1890, the head of said Pogue, Wallace and Crocker Ditch, as the same was changed in the month of January, 1890, diverted and carried away from the channel of said Kaweah River water sufficient to fill said Pogue, Wallace and Crocker Ditch without the aid of a dam at the head of said ditch; that in the month of May, 1890, this defendant peaceably, openly, notoriously and adversely under a claim of right

against said plaintiff (Watson Ditch Company) and its predecessors, so to do, placed a dam in the channel of said Kaweah River at the head of said Pogue, Wallace and Crocker Ditch, which said dam was placed about one hundred yards below the first and original dam hereinbefore referred to, and also at the time last stated this defendant peaceably, openly, notoriously and adversely under a claim of right against said plaintiff and its predecessors, so to do, placed a dam in the original or south channel of said Kaweah River at the point where said new ditch was constructed and led out from said original or south channel down to the original channel of said Pogue, Wallace and Crocker Ditch, and by means of said two dams hereinbefore referred to and the ditches leading into and from said original or south channel of said river, this defendant has, ever since the month of May, 1890 to a short time immediately prior to the 20th day of September 1899 diverted and carried away from the channel of said Kaweah River a stream of water. * * * And this defendant further alleges that Cora Wallace Morton, the wife of J. H. Morton, is the successor in estate of this defendant's said associate W. H. Wallace, and as such he is the owner of an undivided third of said ditch, and for more than five years prior to the 20th day of September 1899 her predecessors, and she as their successor in estate, were in the occupation and use of said ditch as a tenant in common thereof, and by means of said dams and ditch diverted water from said Kaweah River and used said water so diverted upon a portion of the lands first hereinbefore described, continuously and uninterruptedly, and, as this defendant is informed and believes, adversely and under a claim of right against said plaintiff (Watson Ditch Company) and its predecessors, and with knowledge and acquiescence of said plaintiff and its predecessors."

The judgment in the Watson Ditch Company case, dated March 14, 1906, was based on a stipulation and contains the following: "Now the Court being advised in the premises it is ordered, adjudged and decreed, and it is the judgment of this Court, that the said defendant, J. W. C. Pogue, is the owner of that certain water ditch described in his answer, and called Pogue's Lower Ditch, and which leads out of the channel of the Kaweah River referred to in the pleadings in this case at a point on the Southeast Quarter of Sec-

tion Twenty-six in Township Seventeen South, Range Twenty-seven East, of the Mount Diablo Base and Meridian, distant about one hundred yards below the head of what is referred to in said defendant Pogue's Answer as the original head of the Pogue, Wallace and Crocker Ditch; * * * that said defendant J. W. C. Pogue is also the owner of an undivided two-thirds of that certain ditch described as the Pogue, Wallace and Crocker Ditch described in the pleadings in this case from the head of said ditch, where the same connects with the said Kaweah River down to and through the lands of said defendant Cora Wallace Morton, described in the answer of said defendant Cora Wallace Morton; * * * that said defendant Cora Wallace Morton is the owner of the undivided one-third of that certain ditch described in the pleadings in this case as the Pogue, Wallace and Crocker Ditch, from the head thereof where it connects with the channel of said Kaweah River, down to and through the lands of said defendant Cora Wallace Morton described in the answer of said defendant Cora Wallace Morton in this case; that said defendant, Cora Wallace Morton, has the prior and superior right, as against the said plaintiff, (Watson Ditch Company) to divert and carry away from said river at all times three cubic feet of water per second by means of the said Pogue, Wallace and Crocker Ditch or by any other ditch or means which she may provide."

In the instant case the trial court found: "During all of said time said plaintiff and its predecessors in interest had and now has the sole and exclusive right to divert its said three cubic feet of water per second, from said river into the head of said ditch now known as the Foothill Ditch and to convey said three cubic feet of water per second down through said ditch to the lands of the stockholders of plaintiff herein; and that plaintiff has been the owner, in possession, and at all times herein mentioned entitled to the possession of a perpetual easement and water right in and to said Foothill Ditch, formerly known as the Pogue, Wallace and Crocker Ditch, from the head thereof at a point in Section Twenty-six (26), Township Seventeen (17) South, Range Twenty-seven (27) East, M. D. B. & M., down to and near the Southwest corner of the Southeast quarter of Section Nine (9), Township Eighteen (18) South, Range Twenty-seven

(27) East, M. D. B. & M., being a distance of about four miles from the head of said ditch, and the right to divert and flow through said Foothill Ditch the said three (3) cubic feet of water per second, and that said easement and water right is now and was at all times herein mentioned appurtenant to the lands of the stockholders of plaintiff herein, and their predecessors in interest; and that the said plaintiff has the right to divert said three (3) cubic feet of water per second from said Kaweah River, by means of said Foothill Ditch, also known as Pogue, Wallace & Crocker Ditch, or any other ditch, or at any other point on said river, or by any other means it may provide; * * * that under and by virtue of the said decree (of November 2, 1883) the said Emeline Wallace, Cora Wallace and William Henry Wallace were allotted and were given, as owners of the real property so allotted to them, a perpetual easement and right of way on and across the lands allotted to J. W. C. Pogue, which said easement and right of way entitled the said Emeline Wallace, Cora A. Wallace and William Henry Wallace to flow, transport and convey over and across the said lands of J. W. C. Pogue and in and through a certain ditch one-third of all the water appurtenant to the said ditch; that the one-third of all the water appurtenant to the said ditch referred to in the said decree was the three (3) cubic feet of water per second continuously belonging to plaintiff as hereinabove described in these findings; that the said ditch referred to in the said decree is the one wherein and whereby defendant's six (6) cubic feet of water per second and plaintiff's three (3) cubic feet of water per second was transported at the time of the said decree and has at all times since said decree been transported and diverted from the said Kaweah River and, except for certain modifications in the course and point of diversion of the said ditch, and is the ditch through which defendant's six (6) cubic feet of water per second is now being transported and conveyed and the ditch through which plaintiff's three (3) cubic feet of water per second is now transported and diverted from the Kaweah River to the lands irrigated by plaintiff's three (3) cubic feet of water per second; that both plaintiff and defendant and their respective predecessors in interest have at all times since the said decree in 1883 used the same ditch in common for the diversion of their respective waters from the

said Kaweah River and for the transportation of their said waters. * * * The said ditch does now and has at all times since its construction prior to said decree of 1883 followed a course from this point of diversion from the said Kaweah River in a southwesterly direction through the lands described in the said decree of partition and other lands; that the said ditch has been known and designated by various names, among others as 'Pogue, Wallace and Crocker Ditch', 'Pogue's Lower Ditch', and 'Wallace Ranch Water Company's Ditch', and is now known as and will be referred to herein as, the 'Foothill Ditch'; that, although the respective predecessors in interest of plaintiff and defendant have changed the point of diversion of the said ditch in the Kaweah River from time to time, the said point of diversion has always been at substantially the same point, and, upon any change in the point of diversion of the said ditch or in the course which the said ditch has taken or followed through the lands hereinabove described and referred to, both plaintiff's predecessors and defendant's predecessors have used the same ditch as so changed in course and in point of diversion from time to time, and plaintiff and plaintiff's predecessors have each and all used the said ditch and have claimed the right to use the said ditch and to divert the said three (3) cubic feet of water from the Kaweah River through the said ditch and to transport said three (3) cubic feet of water through the said ditch to the lands supplied and irrigated by the said three (3) cubic feet of water as aforesaid. * * * That in the year 1906 a proceeding was instituted in the Superior Court of Tulare County by Watson Ditch Company, a corporation, as plaintiff and against certain defendants, including J. W. C. Pogue and Cora Wallace Morton and her husband, J. H. Morton; that the said action involved the rights of the above-named parties to divert water from the Kaweah River; that in the said action a stipulation was entered into and signed by the parties hereinabove named, among others, and a judgment was entered pursuant to the said stipulation; that a true and correct copy of the said stipulation is attached to the complaint in this action, marked 'Exhibit B', and made a part hereof as fully and to the same effect as though the same were herein set out in full, and that a true and correct copy of the said judgment is attached to the complaint in this action, marked

'Exhibit C', and made a part hereof as fully and to the same effect as though the same were herein set out in full."

It will thus be observed that the trial court particularly found that the new ditch constructed by Pogue and his successors in interest was but a change and relocation of the original Pogue, Wallace and Crocker ditch and that all of the rights the plaintiff had in the old ditch existed in the new. By incorporating into the findings in the instant case, the judgment in the Watson Ditch Company case and the stipulation on which it was based, the trial court also found that the new ditch, or so much of it as had been constructed in 1906, was exclusive property of Pogue; that plaintiff's predecessors in interest had a one-third interest and Pogue a two-thirds interest in the old ditch; and that there were two separate ditches and that plaintiff had no interest in the new ditch as constructed in 1906. We have the following conflicts in the findings between the facts particularly found by the trial court and those incorporated in the findings by including therein the stipulation and judgment in the Watson Ditch Company case:

<i>Facts Particularly Found.</i>	<i>Facts Found from Watson Ditch Company case.</i>
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That there was at the time of trial and never had been but one ditch.	That in 1906 there were two separate ditches.
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That plaintiff and its predecessors in interest since 1883 owned an easement in this ditch to flow three second cubic feet of water through it.	That J. W. C. Poque owned all of the new ditch as constructed in 1906 without any easement in it. That in 1906 Pogue owned two-thirds, and plaintiff's predecessors in interest one-third of the old ditch with the right in plaintiff to flow three second cubic feet of water through it.
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Thus we have an apparent vital conflict in the findings. If there were two separate and distinct ditches in 1906, there is nothing in the evidence to justify the conclusion that this condition had been changed in 1931. If Pogue's ownership of the portion of the new ditch constructed in

1890 was sole and free from any easement in 1906, there is nothing to support the conclusion of the ownership by his successors of a different estate at the time of the trial. If Mr. and Mrs. Morton only owned a one-third interest in the old ditch, and no interest in the new ditch, in 1906, there is nothing to justify the conclusion that their estate or interest, or that of their successors, had changed after that date or that their successors had acquired an interest in the new ditch at the time of trial.

[1,2] We should observe that from the record before us there is nothing to compel the conclusion that J. W. C. Pogue and Mr. and Mrs. Morton were adversaries in the Watson Ditch Company case or that the judgment in that case was rendered in an adversary action in so far as these defendants were concerned. *Hardy v. Rosenthal* (Cal. App.) 38 P.(2d) 412. However, the incorporation of the stipulation and judgment in the Watson Ditch Company case into the findings of fact in the instant case had the effect of making the recitals of the stipulation and judgment findings of fact here. *DeCou v. Howell*, 190 Cal. 741, 214 P. 444; *Kennedy & Shaw Lumber Co. v. S. S. Construction Co.*, 123 Cal. 584, 56 P. 457; *Homesekers' Loan Ass'n v. Gleeson*, 133 Cal. 312, 65 P. 617.

[3,4] It is the well-settled law in California that where two findings on an essential fact at issue are conflicting and opposed to each other, the findings cannot support the judgment and it must be reversed on appeal. *Moody v. Newmark & Edwards*, 121 Cal. 446, 53 P. 944; *Reese v. Corcoran*, 52 Cal. 495; *Manly v. Howlett*, 55 Cal. 94; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, 110 P. 322; *Fanta v. Maddex*, 80 Cal. App. 513, 252 P. 630.

[5] The second ground for reversal is directed at that portion of the judgment which requires the defendant to flow plaintiff's water through the ditch at a charge for maintenance rather than at the rates imposed by formal order of the Railroad Commission. It is the theory of plaintiff, and the one adopted by the trial court, that as plaintiff owned its own water and was flowing this water through its own right of way and as it was not a public utility, the commission had no jurisdiction to make the questioned order which could be attacked in any court.

Section 67 of the Public Utilities Act (St. 1915, pp. 115, 161) provides as follows: "No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. * * *

It was held in the case of *Pacific Tel. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, that no court other than the Supreme Court has any jurisdiction to review, reverse, or annul any order of the Railroad Commission. See, also, *People v. Hadley*, 66 Cal. App. 370, 226 P. 836. In *Allen v. Railroad Commission*, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249, it was held that the Supreme Court had jurisdiction to annul an order of the Railroad Commission which was beyond the jurisdiction of that body to render because the corporation involved was not a public utility. We are of the opinion that the Superior Court has no jurisdiction to indirectly annul an order of the Railroad Commission even though it be assumed that the order in question was beyond the jurisdiction of that body to render.

[6] In considering defendant's third assignment of error we find that it is admitted in the pleadings and established by uncontradicted evidence that the right of the plaintiff to divert 3 cubic second feet of water from the Kaweah river is an equal and not a superior right to that of the defendant to divert 6 cubic second feet of water from that river. The two rights find their source in the right of Pogue, Wallace and Crocker as tenants in common to divert 9 cubic second feet of water. The tenancy in common was broken by the decree of partition in 1883 and the water rights divided, but neither party was given, nor has it since acquired a superior right over the other to divert its water from the river.

The judgment in the instant case recognizes the right of the plaintiff to divert 3 cubic second feet of water from the river. It also enjoins the defendant from in any wise interfering with this right. This has the effect of making the right of plaintiff superior to that of defendant in years

when there are not 9 cubic second feet of water in the Kaweah river subject to their diversion. The importance of this question is shown by the evidence, where it appears that between 1923 and 1931 there were at least two and perhaps three years during which there was not sufficient water in the Kaweah river to enable plaintiff to obtain the 3, and defendant the 6 cubic second feet of water to which each was entitled. The judgment in this case should not give either party a prior or superior right over the other. It should provide that during years where there is a shortage of water to such an extent that each party cannot obtain its full supply, the deficiency be borne proportionately between them.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



7 Cal.App.2d 470
**CORPORATION OF AMERICA v. BANK OF
 AMERICA NAT. TRUST & SAV-
 INGS ASS'N et al.**
 Civ. 1380.

District Court of Appeal, Fourth District,
 California.
 June 8, 1935.

1. Executors and administrators ⇨349(2)

Attack on order granting executor leave to mortgage property of estate, where made in action to foreclose mortgage, constituted collateral attack, requiring court to limit itself to examination of matters which appeared on face of record in proceeding which resulted in entry of order, and to uphold order, if no defect of jurisdiction appeared on face of record, despite showing of error in exercise of jurisdiction, or of irregularity in proceeding, and requiring court, in examining record, to indulge usual presumptions in favor of regularity and validity of proceeding (Code Civ. Proc. § 1578, as amended by St. 1907, p. 988).

2. Executors and administrators ⇨349(2)

In action to foreclose mortgage executed by executor pursuant to order of proper court regular on its face, made in response to petition for leave to execute mortgage likewise

regular on its face and sufficient in substance, evidence that order to show cause designated April 22, as date for hearing of petition which actually took place on April 18 was inadmissible to impeach validity of order authorizing execution of mortgage, and though such evidence was introduced by plaintiff and admitted, court properly ordered foreclosure of mortgage (Code Civ. Proc. § 1578, as amended by St. 1907, p. 988).

3. Executors and administrators ⇨115

Executor or administrator may advance estate which he represents money to be used in payment of pressing claims against estate, or in payment of expenses of administration or fees allowed executor, and may mortgage property of estate to himself, without violating statute prohibiting him from being interested in "sale" of property of estate (Code Civ. Proc. § 1576).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

4. Abatement and revival ⇨8(4)

Pendency of heir's action against executor to terminate testamentary trust with respect to entire property of estate, complaint wherein did not mention mortgage to executor on property of estate, *held* not bar to action to foreclose mortgage, although complaint prayed that heir be decreed owner of entire property of estate, including real property described in mortgage, free from any claims of executor.

5. Action ⇨16

Character of action is determined by substance of action, which is generally to be ascertained by reference to allegations of pleading without regard to nature of relief demanded.

6. Trusts ⇨61(1)

Testamentary trust could be properly terminated without reference to mortgage on trust property.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Mortgage foreclosure action by the Corporation of America against the Bank of America National Trust & Savings Association, as executor of the last will and testament of Arthur T. Connard, deceased, and others. From a decree ordering a sale of the mortgaged premises, defendant Luella Connard Jackson, formerly Luella Connard, appeals.

Affirmed.

W. R. Bailey and Adolph Feierbach, both of Visalia, for appellants.

Harvey & Johnston and T. N. Harvey, all of Bakersfield, and Louis Ferrari, Tobias J. Bricca, and S. J. Tosi, all of San Francisco, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action to recover the principal amount of a certain promissory note executed by the Bank of Italy National Trust & Savings Association on September 16, 1927, together with the interest alleged to be due on such principal amount. The complaint also sought foreclosure of a mortgage on real property which was given to secure payment of the note. From a decree ordering a sale of the mortgaged premises, the defendant Luella Connard Jackson has prosecuted this appeal.

The following undisputed facts are pertinent to the questions which are here presented: On April 30, 1925, the Bank of Italy was appointed executor of the last will and testament of Arthur T. Connard, deceased, and entered upon the discharge of its duties as such executor. The defendant Luella Connard Jackson was one of the heirs at law of the aforesaid decedent. Prior to April 18, 1927, the Bank of Italy National Trust & Savings Association succeeded to all the rights, duties, and obligations of the Bank of Italy and on November 1, 1930, the Bank of Italy National Trust & Savings Association consolidated with the Bank of America of California under the name of Bank of America National Trust & Savings Association. The last-mentioned association succeeded to all the rights, duties, and obligations of the Bank of Italy National Trust & Savings Association. On March 16, 1927, the Bank of Italy National Trust & Savings Association, as executor of the will of the aforementioned decedent, filed with the superior court of Kern county a petition for leave to borrow a sum of money not to exceed \$15,000 and as security for the repayment of such loan to execute a mortgage on certain described real property of the estate of said deceased. The petition was granted by the court, whereupon, on September 16, 1927, the aforesaid executor executed a promissory note in the amount of \$12,000, payable to itself one year after date, and to secure payment of the principal and interest of the note it executed a mortgage on the real property of the estate specified in the peti-

tion for leave to mortgage to itself as mortgagee. Prior to the commencement of the present action, the Bank of America National Trust & Savings Association transferred and assigned the note and mortgage to the plaintiff. The note was not paid upon its maturity and at some time prior to September 16, 1932, the plaintiff filed its complaint seeking foreclosure of the mortgage.

The principal contentions advanced by appellant on this appeal are: First, that the mortgage whose foreclosure is permitted by the decree was void because it was made by the executor of the estate to itself in violation of the strict duty it owed to the estate; and, second, that the mortgage was void because of the lack of notice of the hearing of the petition for leave to execute the mortgage. The second of these contentions will herein be first considered.

During the trial of the present action respondent first introduced the note and mortgage which were admitted in evidence. It next produced a certified copy of the petition for leave to mortgage real property of the estate of Connard which was likewise admitted. The following documents were then offered in evidence by respondent and were admitted: A certified copy of the order to show cause made by the superior court upon the filing of the petition for leave to mortgage property of the estate and a certified copy of the order granting leave to mortgage property of the estate of Connard which was made and entered by said court. The minute order made by the court upon the hearing of the petition for leave to mortgage was also read in evidence by respondent. All of the above-mentioned documents were received in evidence over the objections of appellant.

The evidence thus admitted showed that the petition for leave to mortgage was filed on March 16, 1927; that the order to show cause was made on March 22, 1927; that in said order the hearing of the petition was set for April 22, 1927, and it was ordered that a copy of the order should be published at least four successive weeks in a newspaper of general circulation published in Kern county; that the petition was actually heard on April 18, 1927, and the order granting leave to execute the mortgage was in fact made on April 18, 1927. An affidavit of publication was also received in evidence over the objection of appellant. This affidavit stated that a cer-

tain newspaper mentioned therein was a newspaper of general circulation printed and published daily except Monday in Bakersfield, Kern county, from March 24, 1927, to April 22, 1927, and that the order to show cause made by the court in the estate of Connard was published in said newspaper on each day of its publication during the period from March 24, 1927, to April 22, 1927, inclusive.

It is earnestly contended that since it appears that the petition for leave to mortgage property of the estate was actually heard four days prior to the date designated in the order to show cause, the mortgage whose foreclosure is permitted by the decree from which this appeal has been taken is void because it was executed in accordance with an order which was void. It is contended that the order granting leave to mortgage property of the estate was void because of the failure to have given the required statutory notice of the hearing of the petition to persons interested in the estate. The statute which forms the basis of this attack is section 1578 of the Code of Civil Procedure (as amended by St. 1907, p. 988), as it existed at the time the order granting leave to mortgage was made.

During the month of April, 1927, section 1578 of the Code of Civil Procedure (as amended by St. 1907, p. 988), was entitled "Manner of Obtaining Authority to Mortgage," etc. This statute provided that the executor or administrator of any estate might file a verified petition requesting leave to execute a mortgage on real property of the estate. Detailed description of the matters which such a petition should contain was set forth in five subdivisions. It was next provided that upon the filing of the petition an order should be made requiring all persons interested in the estate to appear before the court at a time and place specified not less than four nor more than ten weeks thereafter to show cause why the realty described in the petition should not be mortgaged. It was then provided that the order to show cause might be personally served on persons interested in the estate at least ten days before the time appointed for the hearing of the petition or that it might be published for four successive weeks in a newspaper of general circulation published in the county. The next subdivision of the statute provided that at the time and place appointed in the order to show cause, the court having first received satisfactory

proof of personal service or publication of the order should proceed to hear the petition and any objections thereto that might have been filed or presented and that, after a full hearing, if the court should be satisfied that it was advantageous to the estate to mortgage the property described in the petition an order should be made authorizing, empowering, and directing the executor or administrator to execute the mortgage and the note to be secured thereby.

[1,2] In giving consideration to appellant's contention that the order granting leave to mortgage was void for lack of proper notice of the hearing of the petition and that consequently the mortgage which was executed pursuant to such order is void, it should first be observed that the attack thus made is a collateral attack. The order might have been directly attacked through the medium of an appeal therefrom. *Estate of McConnell*, 74 Cal. 217, 15 P. 746. Such an attack was not made and the order has long since become final. Since the attack which is here presented is a collateral attack, the trial court in its consideration thereof was limited to an examination of those matters which appeared on the face of the record in the proceeding which resulted in the entry of the order granting leave to mortgage property of the estate. If no excess or defect of jurisdiction appeared on the face of the record, the trial court was not justified in declaring the attacked order to be invalid, even though it was shown that the court which made the order had made some error in the exercise of its jurisdiction or that there was some irregularity in the proceeding. In its examination of the record of the proceeding for permission to mortgage property of the estate, the trial court was required to indulge in the same presumptions in favor of the regularity and validity of the proceeding which govern the construction of the record in an ordinary action. The foundation of jurisdiction in a proceeding for leave to mortgage property of an estate is the petition addressed to the court by the representative of the deceased. *Howard v. Bryan*, 133 Cal. 257, 260, 65 P. 462. We do not understand that it is here contended that the petition which was filed by the executor was defective. In any event, an examination of this document in the light of the specific directions respecting the contents of such an instrument contained in section 1578 of the Code of Civil Procedure produces the conviction that an at-

tack of this character would be unavailing. The statement of facts showing the necessity of providing additional money for the payment of debts and expenses of administration is full and complete. The advantage that would probably accrue to the estate from raising the money proposed to be borrowed is clearly set forth. The amount of money to be raised is specified. The property upon which the mortgage was to be executed is properly described. The names of the legatees and devisees are correctly designated.

The order granting the petition is likewise regular and nothing appears on its face to indicate a lack of jurisdiction in the court to make the order. We do not understand that there is any suggestion to the contrary. It is, however, contended that the evidence produced in form of the order to show cause which designated April 22, 1927, as the date for hearing the petition and the conceded fact that the hearing actually took place on April 18, 1927, which is the date of the order granting the petition, established that no notice was given of the hearing and the order was therefore made without any opportunity being afforded to those interested in the estate to appear and to urge any objection to the granting of the petition. With reference to the evidence upon which appellant relies to establish her claim that the hearing of the petition was had without notice to persons interested in the estate, it should be noted that all of it was produced by respondent and that it was admitted over the objections of appellant. It is apparent therefore that respondent itself laid the foundation for appellant's collateral attack upon the order.

We have then this situation: A mortgage made by the executor pursuant to the authority of an order of the proper court which order is regular on its face and which was made in response to a petition therefor which is likewise regular on its face and sufficient in substance when tested by the directory provisions of the particular statute applicable. Familiar and long-established principles render a mortgage thus executed immune to collateral attack. Extrinsic evidence which impeached the validity of the order authorizing the execution of the mortgage was not therefore properly admissible. The peculiar fact that such evidence was offered by the party seeking to sustain the integrity of the mortgage could not alter the situation.

Nor do we think that the additional fact that the trial court admitted evidence which was not properly admissible compelled the court to decide that the order was void and that consequently the mortgage which owed its existence to the order was void. It is apparent that the trial court arrived at the conclusion that, in giving consideration to a purely collateral attack, it was not justified in going beyond the face of the record of the proceeding consisting of the order granting leave to mortgage and the petition which established the foundation of jurisdiction. Since nothing appeared on the face of this record that indicated any jurisdictional defect in the proceeding, the court evidently concluded that it was warranted in disregarding extrinsic evidence which tended to show that the probate court lacked jurisdiction to make the order because of lack of notice although such evidence was produced by the party who was seeking to sustain the mortgage. In arriving at this conclusion, we are not impelled to declare that the trial court erred.

In this connection, it is proper to observe that there is no intimation that there was any unfairness in the proceeding. It is not pretended that the estate did not actually receive the money whose repayment was secured by the mortgage. The record shows that a part of the borrowed money was used to discharge an obligation contracted by the deceased prior to his death and that a considerable portion of the money was used to pay expenses of administration. Furthermore, it does not appear that appellant, who now seeks to dispute the validity of the mortgage, did not in fact have notice of the hearing of the petition or that she then had any objection to the making of the order. Under these circumstances, a collateral attack which is clearly technical in character is deserving of slight consideration.

[3] In support of her contention that the mortgage sought to be foreclosed is void because it was made by the executor in favor of itself, appellant relies, first, on the provisions of section 1576 of the Code of Civil Procedure as this section existed at the time the mortgage was executed. The above-mentioned statute then provided that "no executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale." It is our opinion that the statute is not even remotely ap-

plicable to the situation here presented. Certainly the execution of the mortgage did not amount to a sale of the property described in the mortgage (*Murphy v. Farmers', etc., Bank*, 131 Cal. 115, 120, 63 P. 368, 731) and we know of no statute or rule of law which prohibits an executor or administrator from advancing to the estate which he represents money to be used in the payment of pressing claims against the estate or in payment of expenses of administration.

It appears to be suggested that because a part of the money advanced by the executor was used to pay the fees allowed to it for its services as executor that there was a breach of the duty which it owed to the estate and to the persons interested therein. It may be conceded that the relationship of an executor to the estate which he represents is confidential and fiduciary; that the executor acts in a highly fiduciary character in his dealings with the estate; and that he is required to exercise the utmost good faith in dealing with persons interested in the estate. It is not here suggested, however, that the executor was enabled to secure any greater compensation for its services as executor than it was entitled to receive or that it gained any advantage at the expense of the estate because of the execution of the mortgage.

Appellant further argues that the mortgage was void because its execution in the manner above outlined constituted a violation of the trust relationship which existed between the executor and the estate and persons interested therein. Various sections of the Civil Code relating to the obligations of a trustee towards his beneficiaries, prohibiting a trustee from dealing with trust property for his own benefit, prohibiting a trustee from obtaining any advantage from his beneficiary through the influence of his position as trustee, etc., are cited in support of appellant's contention. It is perhaps a sufficient answer to the contention to point out that there is not a scintilla of evidence in the record which had the remotest tendency to impute bad faith to the executor in its advancement of money to the estate and in its execution of the mortgage to secure repayment of the loan. It must again be noted that the attack here presented is purely collateral. If appellant considered that the executor was guilty of any violation of the duty which it owed to her because of

the position of trust which it occupied, she has long since had ample opportunity to make a direct attack upon its action in executing the mortgage. Finally, in connection with this contention, it must be observed that a mortgage of the character which is here being considered is essentially different and decidedly less favorable to the mortgagee and those who succeed to his interest than the ordinary mortgage. The point of differentiation is that there is no possibility of a deficiency judgment against any one, other than the estate of the deceased, in the event that a sale of the mortgaged premises does not bring a price sufficient to meet the debt, (*Fast v. Steele*, 127 Cal. 202, 204, 59 P. 585; *Murphy v. Farmers'*, etc., Bank, *supra*): and then the mortgagee would, if it had filed a claim based upon the mortgage, become a general creditor of the estate of the deceased to the extent of the deficiency.

[4-6] Consideration should be given to a final contention advanced by appellant. After respondent had rested its case, appellant offered in evidence a copy of the complaint and summons in a certain action instituted in Fresno county by appellant in which the Bank of America National Trust & Savings Association and the Bank of Italy National Trust & Savings Association were named as defendants. The evidence was admitted and it was stipulated that the action was instituted on February 2, 1932. So far as appears, the action thus brought in Fresno county was pending at the time the present suit was tried in the superior court of Kern county. It was appellant's contention during the trial of the instant action and it is her contention on appeal that the prior action in Fresno county was a bar to the prosecution of this action for foreclosure of the mortgage. Consideration of this contention requires an examination of the complaint filed in the Fresno county action. This examination discloses that the Fresno county suit was brought by appellant for the purpose of terminating a trust with respect to the entire property of the estate of Arthur T. Connard, deceased. It is alleged that the trust was created by virtue of the provisions of the will of the deceased, that the Bank of Italy National Trust & Savings Association was named in the will as executor and upon the settlement of the first and final account the entire property of the estate was distributed to the aforesaid bank as trustee under the terms of the will. It is further alleged that the will provided

that the trust should cease and terminate upon the happening of a certain event which it is alleged has occurred, wherefore it is asked that the court decree that the trust created by the terms of the will has terminated and ended and that appellant ever since the happening of the event specified has been and now is the owner of the entire property of the estate "free from said trust and any claims of said defendants, and is entitled to the possession of all of said property."

Among the property of the estate which is described in the complaint and which is alleged to have been distributed to the above-mentioned bank in trust is the real property which is described in the mortgage sought to be foreclosed by the present action. It is, however, significant that there is no mention of the mortgage in the complaint filed in the suit to terminate the trust. Since this is true and since it is not disputed that the mortgage was executed as shown by the record on this appeal, it is obvious that the pendency of the action in Fresno county could not constitute a bar to the prosecution of the present action. There is only one element that lends the slightest support to appellant's contention with respect to the pendency of the Fresno county action constituting a bar to the present action. This is contained in the hereinabove quoted language of the prayer of the complaint wherein it is asked that it be decreed that appellant is the owner of the entire property of the estate including the real property which is described in the mortgage "free * * * from any claims of said defendants." However, it has been declared that the relief demanded in a complaint does not indicate the character of the action. The character is determined by the substance of the action which is generally to be ascertained by reference to the allegations of the pleading without regard to the nature of the relief demanded. *Bartley v. Fraser*, 16 Cal. App. 560, 564, 117 P. 683. Application of this rule renders appellant's contention untenable. The significant fact that the existence of the mortgage is nowhere mentioned in the complaint raises the inference that appellant did not, in the Fresno county action, seek to have her title in the land quieted against the lien of a valid existing mortgage, but that she merely sought thereby to terminate the trust which is so fully described. No citation of authorities is required in support of the simple proposition that the trust may properly be terminated

without reference to the mortgage lien. The trust created by the terms of the will and the lien created by the mortgage are entirely and essentially different. The former might properly be terminated without affecting in the slightest degree the existence of the latter.

For the reasons herein stated, the judgment is affirmed.

I concur: BARNARD, P. J.

MARKS, J., deeming himself disqualified, does not participate in this opinion.



7 Cal.App.2d 283

PEOPLE v. HOWARD.

Cr. 2738.

District Court of Appeal, Second District,
Division 2, California.

May 31, 1935.

Hearing Denied by Supreme Court
June 28, 1935.

1. Criminal law $\S$ 1081

Where notices of appeal and statements of grounds of appeal were sent by prisoner to clerk's office with statement that dates should be filled in and filed on denial of motions, filling in of such dates on direction of judge and filing of notices as requested *held* sufficient to effectuate appeal, though court had no authority to direct clerk to perform such acts.

2. Indictment and information $\S$ 110(18)

Information charging, substantially in language of Code, in separate counts commission of eight burglaries, each count alleging that defendant willfully entered a described building with intent therein to feloniously steal, take, and carry away the goods and personal property of another *held* to sufficiently charge crime of burglary (Pen. Code, §§ 459, 952).

3. Criminal law $\S$ 912

Motions after verdict may be availed of only once, and when court has denied such a motion, right to make and right of the same court to rule thereon has been exercised and exhausted, and this is true though no appeal is taken from ruling on motion and sec-

ond motion for same relief is based on additional or other grounds.

4. Criminal law $\S$ 912

Where conviction for burglary was affirmed, as well as order denying motion, some two years later, to set aside conviction and Supreme Court denied application to have cause heard by it, no appeal would lie from orders denying subsequent motions to set aside conviction and to correct minutes.

5. Criminal law $\S$ 951(1)

Trial court is without jurisdiction to grant a motion to set aside conviction where grounds assigned could have been raised on appeal from conviction, since only where conviction is void on its face may trial court entertain motion to set it aside after time for new trial and appeal has passed.

6. Criminal law $\S$ 1110(1)

Provision of Code of Civil Procedure relating to relief from default in failing to comply with rules of court on an appeal *held* inapplicable to criminal cases (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Proceeding by the People of the state of California against James Howard. From an order denying defendant's motions to set aside conviction, to correct minutes of court and for writ of attachment to secure defendant's presence at hearing of the motions, defendant appeals. On plaintiff's motion to dismiss appeal.

Motion granted and appeal dismissed.

James Howard, in pro. per.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

On March 5, 1935, appellant, serving a sentence in the state prison following his conviction herein in March, 1931, of six charges of burglary following a prior conviction of a felony, sent to the superior court for Los Angeles county, in which he was last convicted, notices of motion and written motions to set aside the judgment, to correct the minutes of the court, and for a writ of attachment to secure appellant's presence at the hearing of the motions, which were noticed for hearing on March 19, 1935. Accompanying such motions were notices of appeal, statements of grounds of appeal, and demands for a phonographic reporter's transcript of the proceedings on

such motions, with the dates left blank and including the statement: "This written notice and grounds of appeal is not to be dated and filed in the county clerk's office, county of Los Angeles, State of California, until the date the foregoing motion be denied." On March 19 the motions and application for writ of attachment were denied by the court and the judge thereof directed the clerk to fill out the notices of appeal and ordered the necessary transcripts on appeal.

[1] Since the notices of appeal from the order denying the motions were, on order of the trial judge, filled out and filed, it cannot be said, as claimed by respondent, that an appeal was not taken within the time prescribed by law. It is true, as stated in *Frey v. Superior Court* (Cal. App.) 43 P.(2d) 342, that the clerk of the court was not required, under the duties of his office, to fill out and file the notices of appeal after the motions were denied; nor do we think that the court had any authority to order the clerk to perform such acts. But the fact remains that the notices of appeal and other papers necessary to effect an appeal were filled out and filed at the request of appellant, and this as effectually operated as the taking of an appeal as if the acts had been performed by appellant in person. There is, however, ample cause demanding a dismissal of the appeal.

It appears from the record that the judgment of conviction of appellant was affirmed in *People v. Howard*, 115 Cal. App. 140, 300 P. 987, and that about two years later appellant made a motion in the trial court for an order setting aside the judgment, appealed from the order denying this motion, and this court affirmed the order, a rehearing was denied, and an application by appellant to have the cause heard in the Supreme Court was likewise denied by that court. *People v. Howard*, 134 Cal. App. 441, 25 P. (2d) 498.

[2] While not necessary to this decision, we have examined the record and appellant's brief and find no merit in the contention, upon which his motions were based, that the information fails to charge a criminal offense and cannot support the judgment. The information, substantially in the language of section 459 of the Penal Code, charges the commission, in separate counts, of eight burglaries, each count alleging that the defendant willfully entered a described building with intent to therein feloniously steal, take, and carry away the goods and personal property of another. This sufficiently charged the crime of burglary. *Frey v. Superior Court*, supra; *People v. Myers*,

206 Cal. 480, 275 P. 219; *People v. Lannagan*, 96 Cal. App. 669, 274 P. 607; *Pen. Code*, § 952.

[3] While the law provides for and recognizes various motions after verdict, each of such remedies may be availed of but once; and when the court has denied such a motion, the right to make and the right of the same court to rule upon such motion has been "exercised and exhausted." And this is true even where no appeal is taken from the ruling on the motion; and the fact that the second motion for the same relief is based upon other or additional grounds does not alter the rule. *People v. Paysen*, 123 Cal. App. 396, 399, 11 P.(2d) 431, and cases cited.

[4] The case before us is practically identical with *People v. Van Buren*, 134 Cal. App. 206, 25 P.(2d) 32, 33, in which on appeal the judgment of conviction was affirmed. Thereafter defendant moved the trial court to vacate the judgment, which motion was denied, and an appeal from the order denying the motion was dismissed by order of the District Court of Appeal, following which defendant presented to the trial court a second motion to vacate the judgment, and, that motion being denied, again took an appeal. The court there said: "Not only is it clear that on the original appeal from the judgment appellant might have presented for decision by this court the identical point which he now urges, but also (assuming, but not deciding, the propriety of his first motion to vacate the said judgment) that he might have done so on his appeal from the order by which his motion to vacate the said judgment was denied." The court held that an appellate court will not entertain an appeal from an order made after judgment where the appeal from the judgment would present precisely the same question, the alleged error or defect being one appearing upon the face of the judgment roll. As there stated, the appellate court dismissed the appeal for the reason that to consider such an appeal would have the effect of allowing the right to more than one appeal involving the same question of law in the same case. The same conclusion under similar facts, with the difference that there had been no prior motion to vacate the judgment, was reached in *People v. Bowles*, 135 Cal. App. 514, 27 P.(2d) 411.

[5,6] In view of the fact, as stated in *Frey v. Superior Court*, that a large number of motions to set aside judgments have been made in their cases by prisoners, it might be added that the trial court is without ju-

isdiction to grant a motion to set aside a judgment where the grounds assigned are all matters which could be raised on an appeal from the judgment; and it is only when a judgment is void on its face that a motion can be entertained to set it aside after the time for a new trial and appeal has passed. *People v. Russell*, 139 Cal. App. 417, 419, 34 P.(2d) 203. It should also be noted that the reference in the *Russell* Case to section 473 of the Code of Civil Procedure is no longer applicable, it having since been held, in *Gonzales v. Superior Court* (Cal. Sup.) 44 P.(2d) 320, that such section is not applicable to criminal cases.

Motion granted; appeal dismissed.

We concur: CRAIL, J.; STEPHENS, P. J.



7 Cal.App.2d 227

POMONA COLLEGE v. DUNN et al.

Civ. 1134.

District Court of Appeal, Fourth District,
California.

May 28, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Eminent domain ⇨154

Mortgagee may subject award of compensation to landowner for part of mortgaged premises, taken in eminent domain proceeding, to lien of mortgage in proper case; award being considered as land under doctrine of equitable conversion.

2. Judgment ⇨589(1), 665

Statute declaring judgment conclusive of matter directly adjudged as between parties and their successors in interest, litigating for same thing, under same title and in same capacity, if they have actual or constructive notice of pendency of action, does not limit estoppel to action identical in form with former suit, or in which same parties are plaintiff and defendant (Code Civ. Proc. § 1908, subd. 2).

3. Judgment ⇨678(1)

Res judicata doctrine may be invoked whenever parties in second action are in privity with parties to first action, and same issue, determined in former suit, is presented for determination in second action (Code Civ. Proc. §§ 1908, subd. 2, 1911).

4. Judgment ⇨585(1), 720

Judgment operates as bar against second action on same cause, and as estoppel or conclusive adjudication as to such issues in subsequent action on different claim as were actually litigated and determined in first action (Code Civ. Proc. §§ 1908, subd. 2, 1911).

5. Eminent domain ⇨243(2)

Judgment condemning portion of mortgaged land for city's use held not to bar subsequent mortgage foreclosure action; such action being on entirely different claim than eminent domain proceedings (Code Civ. Proc. § 1908, subd. 2).

6. Eminent domain ⇨243(2)

Mortgagee's right to share in award of compensation for portion of mortgaged land, taken by city in condemnation proceeding under Street Opening Act, held proper issue in such proceeding, and hence conclusively adjudicated adversely hereto as between parties to subsequent foreclosure suit by judgment awarding compensation to landowner only (St. 1925, pp. 241 and 87, §§ 5, 6; St. 1927, pp. 1145, 1146, §§ 8, 10; Code Civ. Proc. §§ 1908, subd. 2, 1911).

The complaint in the condemnation proceeding prayed that defendants, including mortgagee, be required to set forth nature and extent of their estates or interests in land by answer, that such estates or interests be determined and adjudicated, that value thereof and damage to respective owners be ascertained and determined, and that final judgment condemning land to public use be entered on payment of amount so determined to defendants.

7. Eminent domain ⇨243(3)

Holder of mortgage on property, part of which was sought to be condemned under Street Opening Act, was proper party defendant in condemnation suit, and hence estopped by court's findings that mortgage security was not impaired, and that mortgagee was not entitled to share of compensation, awarded property owner, to claim share thereof in subsequent foreclosure suit, though not strictly owner of estate or interest in property; statutory definitions of terms "owner" and "any person interested" referring only to sections relating to levy and payment of assessments (St. 1911, p. 855, § 33, subd. 7; St. 1927, p. 1146, § 10; Code Civ. Proc. §§ 1908, subd. 2, 1911).

8. Eminent domain ⇨243(2)

Court's findings in proceeding to condemn portion of mortgaged land under Street Opening Act that mortgage security was not impaired, so that mortgagee, served with copy of complaint and summons, but not appearing, was not entitled to share of compen-

sation awarded landowner, *held res judicata* in subsequent foreclosure suit as against contention that only issue respecting mortgage in condemnation action was its existence and validity (St. 1903, p. 385, § 31; St. 1909, p. 1040, § 12; St. 1927, p. 1146, § 10; Code Civ. Proc. §§ 1908, subd. 2, 1911).

9. Eminent domain ⇨243(2)

Mortgagee's failure to appear in action to condemn portion of mortgaged premises under Street Opening Act after being served with process did not prevent adjudication, binding on mortgagee in subsequent foreclosure suit, that mortgage security was not impaired, and hence that mortgagee was not entitled to share of compensation awarded landowner (St. 1903, p. 376, as amended; Code Civ. Proc. §§ 1908, subd. 2, 1911).

10. Judgment ⇨704

Res judicata doctrine applies only to adversary parties in former action (Code Civ. Proc. § 1910).

11. Eminent domain ⇨243(2)

Judgment denying compensation to mortgagee for portion of mortgaged premises, taken by city in condemnation action against both mortgagor and mortgagee, *held res judicata* as to mortgagee's claim to share of compensation awarded mortgagor in subsequent foreclosure suit as against contention that parties thereto were not adversaries in condemnation action; their interests in outcome thereof being antagonistic, though they were joined as codefendants (St. 1927, p. 1146, § 10; Code Civ. Proc. §§ 1908, subd. 2, 1910, 1911).

12. Eminent domain ⇨243(3)

Trustee in bankruptcy of mortgagor adjudicated bankrupt during pendency of city's action to condemn portion of mortgaged land, legal title to which he had conveyed to defendant bank under trust, which was void as perpetuity, *held* not foreclosed from setting up judgment, awarding compensation in such action to bank only, as *res judicata* in subsequent foreclosure suit on ground of lack of privity between him and bank, which continued to hold legal title in trust for mortgagor (St. 1903, p. 376, as amended; Code Civ. Proc. §§ 1908, subd. 2, 1911).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Pomona College, a corporation, against Leah Dunn, individually and as executrix of the last will and testament of Fred B. Dunn, deceased, the Mueller Furniture Company, a copartnership, Russell B. Seymour, as trustee of the bank-

rupt estate of Fred B. Dunn, and others, in which defendant furniture company filed a cross-complaint against plaintiff and another. From a portion of a judgment and decree foreclosing a mortgage in plaintiff's favor, defendant bankruptcy trustee appeals.

Reversed, with directions.

Goodspeed, Pendell & McGuire, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles (Edward H. Gaylord, of Los Angeles, of counsel), for plaintiff-respondent.

Goodspeed, Pendell & McGuire, of Los Angeles, for respondent Sligh Furniture Co.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent Security First Nat. Bank of Los Angeles.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent Leah Dunn.

JENNINGS, Justice.

This is an appeal by the defendant Russell B. Seymour, as trustee in bankruptcy of the estate of Fred B. Dunn, a bankrupt, from a portion of the judgment and decree of foreclosure made and entered in an action instituted by the plaintiff for the purpose of foreclosing the lien of a mortgage executed by Fred B. Dunn and his wife in favor of plaintiff, Pomona College, a corporation. That portion of the judgment from which the appeal has been perfected decrees that, if, upon sale of the mortgaged premises, the proceeds thereof are insufficient to pay the amount found due to plaintiff under its mortgage, there shall be applied toward the satisfaction of such deficiency the sum of \$5,568 or such part thereof as may be necessary, which sum is in the possession of the defendant Security First National Bank of Los Angeles and is declared to be a part of the security of plaintiff's mortgage on which sum it is adjudged the plaintiff has a lien by virtue of its mortgage.

The record herein shows the existence of the following facts which are material to this appeal: On September 28, 1925, Fred B. Dunn and his wife, Leah Dunn, executed a promissory note in the amount of \$10,000 in favor of plaintiff, Pomona College. The note was payable three years after its date, and the payment thereof was secured by a mortgage on real prop-

erty fronting on Temple street in the city of Los Angeles which was then owned by the Dunns. On August 8, 1927, the city of Los Angeles commenced an action in the superior court of Los Angeles county for the purpose of condemning a portion of the real property which was encumbered by the lien of the aforesaid mortgage. The mortgagee, Pomona College, was joined as a party defendant in this action, was duly served with process therein, and defaulted in appearance. The complaint in this action alleged on information and belief that the defendant, Pomona College, claimed an interest in the parcel of land sought to be condemned by virtue of the mortgage, and further alleged a lack of sufficient knowledge, information, or belief to enable the plaintiff to state whether said mortgage constituted a valid and subsisting lien upon the land. Wherefore, basing its denial upon the lack of such information, the plaintiff denied that said defendant had any interest in the said land. The prayer of the complaint was that defendants be required to set forth the nature and extent of their several estates or interests in the land, that such estates or interests may be adjudicated and determined, that the value of each and every such separate estate or interest in the land and the damage accruing to the respective owners thereof by reason of the condemnation in the construction of the improvement in the manner proposed by the plaintiff be ascertained and adjudged, that upon payment to said defendants of the several amounts so ascertained the court make and enter a final judgment condemning the land to the public use for the public improvement described in the complaint. Upon the conclusion of the trial of this action, the trial court found that the value of the land taken and of all improvements thereon pertaining to the realty was \$5,568, and that no damage would result to the remainder of the parcel by reason of the condemnation of that portion sought to be condemned. The court further specifically found "that the defendant Pomona College, a corporation, has an interest in and to said parcel of land under and by virtue of a mortgage but that the security of said mortgage is not impaired, and therefore said defendant is not entitled to receive compensation herein." On January 6, 1930, an interlocutory judgment in said action was duly entered. In this judgment it was decreed that, upon payment to the several

defendants of the amounts determined as compensation proper to be paid to them, the parcel of land described in the complaint should be condemned to the use of plaintiff, the city of Los Angeles. On November 10, 1931, the plaintiff in said action paid into court the aforesaid sum of \$5,568 to meet the award made by the interlocutory judgment. On November 20, 1931, the said sum so deposited was paid to the holder of the legal title of the land affected by the condemnation action. Final judgment of condemnation was thereupon entered. No appeal was taken either from the interlocutory judgment or from the final judgment in said condemnation action. On December 9, 1931, Pomona College instituted the present action whereby it sought to foreclose its mortgage and to have recourse to the aforesaid award of \$5,568 in the possession of the Security First National Bank of Los Angeles, holder of the legal title of the mortgaged land or to such part of said sum as should be necessary to satisfy any deficiency that might remain after the mortgaged premises were sold and the proceeds of such sale applied to the mortgaged debt. The principal defense pleaded and urged during the trial of the action by the trustee in bankruptcy of the bankrupt estate of Fred B. Dunn, the mortgagor, was that the interlocutory judgment in the aforesaid condemnation action instituted by the city of Los Angeles in which action Pomona College was joined as a party defendant decreed that the security of the mortgage was not impaired by the taking of a portion of the mortgaged premises, that consequently the mortgagee was not entitled to any compensation for such taking, and that this judgment, having long since become final, amounts to an adjudication by which the plaintiff in the instant action is bound. This contention did not prevail in the trial court. It constitutes the principal contention urged on this appeal for reversal of the judgment.

The problem which is therefore presented in connection with the contention thus advanced is whether or not the right of the respondent mortgagee to have recourse to the award granted to the landowner for the taking of a part of the mortgaged premises has become *res judicata* by virtue of the judgment in the prior condemnation action.

[1] In entering upon a consideration of this problem, it must be conceded at the

outset that the right of a mortgagee in a proper case to subject an award made to the landowner as compensation for a part of the mortgaged premises taken through the medium of eminent domain proceedings to the lien of his mortgage is not open to doubt. Under the familiar doctrine of equitable conversion, the award is considered as land, and the mortgagee is entitled so to regard it and to have recourse to it in satisfaction of the mortgage lien. *Los Angeles T. & S. Bank v. Bortenstein*, 47 Cal. App. 421, 423, 190 P. 850. Here, however, the mortgagee was joined as a party defendant in the condemnation action and was served with process therein so that the court in said action had jurisdiction of the subject-matter and of the mortgagee, and found that the security of the mortgage was not impaired by the taking of the land, for which reason no award was made to the mortgagee in such action.

[2,3] The long-established principle of *res judicata* is specifically recognized by statute in California. Subdivision 2 of section 1908 of the Code of Civil Procedure declares that in cases other than those designated in subdivision 1 of the section the judgment in an action or special proceeding before a court or judge of this state having jurisdiction to pronounce the judgment is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding. The rule thus announced is extended by section 1911 of the same Code to cover those matters which were actually and necessarily included in the former judgment or necessary thereto. The language of section 1908 has been so construed as not to limit the estoppel to an action identical in form with the former suit or in which the same parties are plaintiff and defendant in each action, and it is settled that the doctrine may be invoked whenever, in the second action, the parties are in privity with the parties to the first action and the same issue is presented for determination which was determined in the former suit. *Lamb v. Wahlenmaier*, 144 Cal. 91, 93, 77 P. 765, 103 Am. St. Rep. 66; *Martin v. Holm*, 197 Cal. 733, 750, 242 P. 718.

[4,5] It is obvious that the legal principle which forms the basis for the doctrine of *res judicata* is the familiar principle of estoppel. In *Todhunter v. Smith*, 219 Cal. 690, 695, 28 P.(2d) 916, it is pointed out that the doctrine of *res judicata* has a double aspect, and that while a prior judgment operates as a bar against a second action upon the same cause, it operates as an estoppel or conclusive adjudication in a subsequent action upon a different claim as to such issues in the second action as were actually litigated and determined in the first action. It is apparent that, if the doctrine is here applicable, it can only apply as an adjudication of issues which were actually litigated and determined in the prior suit in condemnation. The prior judgment may not operate as a bar to the present action for the reason that the present action is upon an entirely different claim than that which formed the basis of the proceeding in eminent domain.

In support of the judgment, respondent contends that the only issue which is here important that was adjudicated in the prior action is the validity of respondent's mortgage. In the final analysis the correctness of this contention depends upon the allegations contained in the complaint in the condemnation action.

[6] It is conceded and the trial court found that the proceedings for condemnation were instituted under the "Street Opening Act of 1903" (St. 1903, p. 376, as amended). The trial court also found that the prayer of the complaint in the condemnation action was that defendants should be required, by answer, to set forth the nature and extent of their several estates or interests in the land sought to be condemned, that such several estates or interests be determined and adjudicated, that the value of each such separate estate or interest and the damage accruing to the respective owners of such separate estates or interests by reason of the condemnation thereof should be ascertained and determined and that, upon payment to said defendants of the several amounts so determined, a final judgment be entered condemning the land to public use. Since it is conceded that the condemnation action was brought under the Street Opening Act of 1903, the provisions of this statute must be examined for the purpose of discovering whether or not the right of the mortgagee, respondent herein, to share in

the award granted for the taking of the land was properly adjudicated in the prior action. Section 5 of the act (St. 1903, p. 378, as amended by St. 1925, p. 241) provides that after jurisdiction has been acquired the city council shall, by ordinance, order the improvements to be made and direct an action to be brought by the city attorney in the superior court in the name of the municipality for the condemnation of the property necessary or convenient to be taken therefor. Section 6 (St. 1903, p. 378, as amended by St. 1925, p. 87) contains a mandate to bring the action upon the passage of the ordinance ordering the improvement. Section 8 (St. 1903, p. 378, as amended by 1927, p. 1145) provides for setting the case for trial and for the appointment of referees to ascertain the compensation to be paid. Section 10 (St. 1903, p. 379, as amended by St. 1927, p. 1146) specifies the time when the right to compensation and damages shall be deemed to have accrued and the findings which the referees or the court or jury are required to make. It is there provided that the value of each parcel of property sought to be condemned "and of each separate estate or interest therein" shall be found. It is also there provided that the damages that will accrue to the remainder of the parcel "and to each separate estate or interest therein" by reason of the severance of the portion sought to be condemned shall be found.

Bearing in mind the above-mentioned provisions of the statute under which the condemnation action was instituted and the allegations of the complaint therein, it is obvious that the right of the respondent to share in whatever award might be made was a proper issue in the action.

[7] Respondent, however, contends that it was not a necessary party defendant to the prior action, and since it is conceded that it made no appearance therein, it is not estopped by the trial court's finding in such action that the security of the mortgage was not impaired, and that the mortgagee was not entitled to receive any compensation or to have any share of the award made to the property owner for the taking of a portion of the mortgaged premises. In connection with this contention, a number of arguments are presented which are entitled to careful consideration.

It is first urged that respondent was not a necessary party to the condemnation suit

for the reason that in California a mortgagee has no estate or interest in the land which is encumbered by the lien of the mortgage. In support of this argument, a number of decisions are cited. The earliest of these authorities is the case of *Schumacker v. Toberman*, 56 Cal. 508. In this case, the city council of the city of Los Angeles, acting under the provisions of the city charter, had determined to extend and widen a certain street and had ordered proceedings for condemnation to be instituted. In these proceedings the city failed to make a mortgagee of one of the parcels sought to be condemned a party. When the damages had been ascertained, the council ordered an assessment to pay such damages to be made "On Alameda street, one hundred feet each way from its intersection with Los Angeles street; and on Los Angeles street (and intervening cross-streets) from Alameda street southerly to Requena street." Subsequently an assessment was returned and adopted by the council which included the property on the north line of Requena street. Afterwards the council ordered the surveyor to correct the assessment by striking therefrom the assessment of the property on Requena street and increasing the other assessments proportionally. This correction was accordingly made. The plaintiff, *Schumacker*, a property owner and taxpayer in the city, brought an action to enjoin the issuance of bonds to pay the cost of the street improvement and succeeded in having an injunction granted. On appeal by the defendant, the judgment was affirmed. The majority opinion held that the first assessment was void, and that the statute under which it was proposed to issue the bonds had adopted the void assessment. Therefore the issuance of bonds under the authority of a statute which had adopted a void assessment should be restrained in an action brought for this purpose by a property owner and taxpayer who might be injuriously affected by the issuance of such bonds. No mention was made in the majority opinion of the failure to have included the mortgagee of a part of the property sought to be condemned as a party in the condemnation. In a concurring opinion, Mr. Justice Myrick said: "I am of opinion, that Michael Reese, being a mortgagee, was not a necessary party." It is significant that in the concurring opinion no other mention is made of the failure to have joined the

mortgagee as a party, and that the opinion is based on other and different grounds. It is apparent, therefore, that the above-quoted language is dictum. The syllabus of the case so regards it, for it is there declared: "It seems that a mortgagee is not a necessary party in proceedings for the condemnation of land for street improvement."

In *Savings & Loan Society v. McKoon*, 120 Cal. 177, 52 P. 305, 306, the mortgagee, a California corporation, brought an action to foreclose its mortgage and obtained a decree. On appeal it was contended that the action should have been dismissed because of noncompliance by the plaintiff with section 299 of the Civil Code, as it then existed, requiring every corporation to file with the county clerk of every county in the state in which it held any property, a certified copy of its articles of incorporation, and providing as a penalty for noncompliance with this direction that the corporation should not maintain or defend any action in relation to such property. It was decided that the penalty imposed by the statute did not apply to an action for the foreclosure of a mortgage. One of the grounds of the decision was that a mortgage, although in form a conveyance, is not so in fact, and that the legal effect of a mortgage is merely to create a lien on the land which is an incident of the secured debt, and that a foreclosure suit is simply an action for the collection of a debt and the enforcement of a lien. In the course of its decision, the court, in referring to the character of mortgages, used the following language: "They pass no estate in the land, but are mere securities." It is further said in the opinion: "It is manifest that the plaintiff did not, at the time of the commencement or trial of this action, own or hold the said mortgaged property, and therefore did not subject itself to the penalty imposed by section 299 of the Civil Code." It may properly be observed that the last-quoted language is the real ground of the decision, and that the language of the court with reference to the fact that a mortgage passes no estate in land is dictum.

In *Guinn v. McReynolds*, 177 Cal. 230, 170 P. 421, which was a suit to foreclose a mortgage, the county of Tulare, a defendant in the action, set up a claim of lien for expenses incurred in eradicating infectious diseases and insect pests under section 2322a of the Political Code. On

appeal by the aforesaid county, a judgment in favor of the mortgagee was affirmed. The ground of the decision was that there was nothing to be discovered in the statute to indicate a legislative intent to make the county's lien superior to other liens earlier in time. In discussing the matter, the court adverted to the language of the statute which provides for the foreclosure of the county's lien by sale of the property, and that any surplus remaining shall be paid to the property owner. It was pointed out that the provision for the payment of the surplus furnished some ground for declaring that the legislative intent was that pre-existing mortgage liens should not be affected by the county lien. In connection with this phase of the case, it was remarked that a mortgagee has no ownership or interest in the mortgaged land, and that, under California law, he is merely the holder of a lien which is an incident of the debt. The language which declares that a mortgagee has no interest in the land is dictum not necessary to the decision.

In *Johnson v. Razy*, 181 Cal. 342, at page 344, 184 P. 657, there is again a declaration that a mortgage lien is not an interest in mortgaged property, but a mere lien thereon. Analysis of the court's opinion discloses that this declaration is dictum.

With respect to the three above-mentioned authorities, it may be observed that the statement that a mortgage vests in the mortgagee no estate or interest in the mortgaged land, but creates merely a lien is a correct statement under the facts of those cases. We are not here, however, dealing with a problem which is similar to those that were presented in the cited cases. We are here dealing with the language of a particular statute which sets up machinery that may be utilized by a municipality in exercising the right to condemn private property for public use, and which contains explicit directions as to the findings to be made by the referees who are appointed by the court to ascertain the compensation to be paid for the land or by the court itself or by the jury. The statute specifically requires that the value of each parcel sought to be condemned "*and of each separate estate or interest therein*" (italics ours) shall be found. It is our conclusion that the quoted language is sufficiently broad to indicate that the holder of a mortgage on prop-

erty, a part of which is sought to be condemned under the provisions of the statute here considered, is a proper party defendant in the condemnation suit, notwithstanding the fact that, strictly speaking, he is neither the owner of an estate or interest in the property. Certainly he has some sort of interest in the land by reason of the lien of his mortgage and is obviously interested in the outcome of an action, the result of which may be to impair the security of his mortgage lien. In *City of Vallejo v. Superior Court*, 199 Cal. 408, 416, 249 P. 1084, it was declared that the owner of a deed of trust given to secure payment of a promissory note had a present proprietary interest in the land conveyed by such trust deed which it had the right to have considered and determined in an action instituted by a municipality for the purpose of condemning a portion of the land encumbered by the trust deed.

Respondent points to the fact that section 33 of the act (St. 1903, p. 385, as amended by St. 1911, p. 855) now being considered defines various words and phrases used in the statute and that subdivision 7 of such section so defines the terms "owner" and "any person interested" as to eliminate the necessity of including a mortgagee as a party defendant in a condemnation action brought under the provisions of the act. Examination of the entire act is, however, productive of the conclusion that the definition of the above-quoted terms set forth in subdivision 7 of the section refers to certain sections which relate to the levying and payment of assessments wherein these exact terms are used. The phraseology of section 10 to which reference has heretofore been made is definitely broader than the terms which are defined in subdivision 7 of section 33, and it is our conclusion that the language of the former section is not to be measured by the narrow limitations of the latter section. We are the more constrained to this view by reason of the language of subdivision 7 of section 33, which makes explicit reference to assessments.

[8] Respondent further contends that the only issue in the prior action presented for the trial court's determination which related to the mortgage was the existence and validity of the mortgage, that respondent was entitled to believe that this was the only issue referring to the mortgage that would be determined, and that

the trial court in said action having gone further than this, and having decided that the security of the mortgage was not impaired, and that the mortgagee was for this reason not entitled to compensation, its judgment as to these latter matters which were not proper issues in the action is not *res judicata* in the present action.

This contention is not appealing. As heretofore noted, section 10 of the act which bears the title "Compensation and Damages" definitely requires the referees or court or jury to find the value of each parcel of property sought to be condemned and of each separate estate or interest therein and the damages that will accrue to the portion not sought to be condemned and to each separate estate or interest therein by reason of severance. The obvious purpose of requiring these findings would appear to be to enable the court to arrive at a determination of the compensation and damages to be awarded to all parties having an interest in the property affected by the condemnation proceedings. Section 12 of the statute (St. 1903, p. 379, as amended by St. 1909, p. 1040) provides that upon the confirmation of the report of the referees or receipt of the jury's verdict, or the filing of the court's findings, "the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the costs allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint." Section 31 of the act (St. 1903, p. 385) provides that upon satisfactory proof of payment of the awards to the respective parties entitled thereto, the court shall direct satisfaction of the interlocutory judgment and shall enter a final judgment of condemnation.

The three sections of the act to which reference has been made, viz., sections 10, 12, and 31, therefore provide a complete plan for ascertaining the value of any estate or interest in the property affected by a condemnation action brought in accordance with the provisions of this particular statute and for determining the compensation which shall be awarded for the taking and for ordering payment of the compensation in the interlocutory judgment. It is admitted that respondent was

served with a copy of the complaint in the action and with summons to appear. The respondent is charged with knowledge of the provisions of the statute under which the action was brought. The prayer of the complaint and the above-mentioned sections of the statute afforded to respondent ample notice that there would be an ascertainment and determination of the damage, if any, which would accrue to it by reason of the taking of a portion of the mortgaged premises.

[9] The respondent also contends in support of the judgment that since it did not appear in the condemnation action, although it was served with process, there could be no adjudication binding upon it respecting the impairment of the security of the mortgage. This contention is lacking in merit. *Morenhout v. Higuera*, 32 Cal. 289.

[10, 11] It is also urged that the doctrine of *res judicata* is not here applicable, because it is said that respondent and the mortgagor, Fred B. Dunn, were not adversaries in the prior action in condemnation. It is the rule that the doctrine is applicable only when it may be declared that the parties to whom the doctrine is sought to be applied were adversary parties in the former action. Section 1910, Code Civ. Proc.; *Estate of Heydenfeldt*, 127 Cal. 456, 459, 59 P. 839; *Robson v. Superior Court*, 171 Cal. 588, 594, 154 P. 8; *Victor Oil Co. v. Drum*, 184 Cal. 226, 239, 193 P. 243; *Estate of Lloyd*, 106 Cal. App. 507, 512, 289 P. 892. It must, however, be conceded that an action in condemnation is, in some respects, different from an ordinary action at law. Certainly an action brought under the provisions of the statute which is here involved presents certain aspects of differentiation. As has heretofore been observed, the duty is imposed upon the trial court to discover and to find the value of each parcel sought to be condemned and of each separate estate or interest therein and to enter an interlocutory judgment in accordance with the findings providing for payment of the compensation awarded to the parties to the action. It was said in *Anderson v. Citizens' Savings, etc., Co.*, 185 Cal. 386, 391, 197 P. 113, 116, "It is one of the functions of a condemnation suit to determine as between the defendants, who is the owner of the property and therefore entitled to the compensation for its tak-

ing, and where it appears on the face of the pleadings that the property sought to be condemned is part of a larger tract, which is claimed adversely to each other by two or more defendants, it may well be that a judgment that one of the defendants is the owner of the property condemned will be an adjudication as to the title to the whole tract of which it is but a part." It is apparent that it is one of the functions of a condemnation action brought under the particular statute which is here involved to ascertain the value of the separate interests in the land sought to be condemned and to determine the compensation proper to be awarded to the owner of each interest. When, therefore, a mortgagee is made a party to such an action and is served with process therein and elects to make no appearance, it is entirely reasonable that he should be bound by the judgment in the action which denies any award of compensation to him. The alignment of parties is not conclusive. The very character of the peculiar action in which respondent and its mortgagor were joined as parties defendant indicates that these parties were adversaries, although they were there named on the same side of the action. They were in reality adversary parties, because the mortgagee was primarily interested that the security of the mortgage should not be impaired by the taking of the property. The mortgagor's primary interest was that he should receive full compensation for the land which he owned, and which was then being taken. These interests were by no means identical. On the contrary, they were antagonistic. The effect of the decree in the condemnation action granting no award to the mortgagee was prejudicial to the mortgagee. It was not injurious to the mortgagor. The award granted to the mortgagor was for the value of the land taken. In effect, it amounted to a sale of the parcel condemned. If any award had been made to the mortgagee, such award would necessarily have been taken from the award granted to the mortgagor. Analysis of the situation demonstrates, therefore, that, although the mortgagor and mortgagee were co-defendants in the condemnation action, their interests in the outcome of the suit were really antagonistic. It is our opinion that under the peculiar circumstances here appearing, it may not be successfully urged that the doctrine of *res judicata* is not applicable because the mortga-

gee and mortgagor were joined as codefendants in the prior action.

[12] Respondent finally contends that appellant is not entitled to invoke the doctrine of res judicata for the reason that Fred B. Dunn, who was adjudicated bankrupt during the pendency of the condemnation action, was not a party to said action. The prior action was brought against the Security First National Bank of Los Angeles, holder of the legal title to the land and the mortgagee, Pomona College. It is said that there was no privity between the bank and appellant, trustee in bankruptcy of the bankrupt estate of Fred B. Dunn. Appellant contends that the trust under which Dunn conveyed legal title to the bank was void as a perpetuity. The correctness of this contention respondent concedes, but argues that the trust being void, the rights of the parties are as if the trust had never been made, and the trust being void, the bank did not take the legal title to the property as trustee for appellant, but the title, both legal and equitable, remained in Dunn at all times until he was adjudicated a bankrupt, when it passed to appellant as his trustee. The conclusion which is reached by this reasoning is that the rights of appellant as trustee are derived adversely to and not from the bank, for which reason there is no privity between the bank and appellant, hence appellant is not entitled to invoke the doctrine of res judicata.

The argument is ingenious, but is not convincing. Assuming that the trust under which Dunn conveyed to the bank was void by reason of being a perpetuity, the fact remains that at the time the condemnation action was instituted the record legal title stood in the bank. The trust being void, the bank continued to hold the legal title in trust for Dunn. Dunn, therefore, was the real party in interest in the condemnation action. When, during the pendency of the condemnation action, Dunn was adjudicated a bankrupt and appellant was appointed his trustee in bankruptcy, the latter succeeded to all of Dunn's rights in the property sought to be condemned for the benefit of Dunn's general creditors. There was thus privity of estate between Dunn, the real party in interest other than respondent in the condemnation action, and appellant, the trustee of the bankrupt estate. It is our

opinion, therefore, that appellant is not foreclosed from invoking the doctrine of res judicata because of the seeming lack of privity for which respondent contends.

The conclusion which we have reached with respect to the applicability of the doctrine of res judicata renders it unnecessary to consider other contentions advanced by appellant on this appeal.

The judgment is therefore reversed, with directions to the trial court to correct its findings and conclusions of law, and to modify the judgment in accordance with the views herein expressed.

We concur: BARNARD, P. J.; MARKS, J.



7 Cal.App.2d 392

PEOPLE v. HOBSON et al.

Cr. 2705.

District Court of Appeal, Second District,
Division 1, California.

June 5, 1935.

1. Criminal law ☞511(1)

Accomplice's testimony must be eliminated in determining question of corroboration (Pen. Code, § 1111).

2. Criminal law ☞511(7)

Statement by defendant charged with burglary of store from which rugs were taken, when asked by officers after arrest why he was in jail, that it was just a "dumb beef" and that he would help officers recover rest of rugs, held insufficient to corroborate accomplice's testimony to sustain conviction (Pen. Code, § 1111).

3. Criminal law ☞511(1)

Corroborative evidence is insufficient where it merely casts a grave suspicion on accused (Pen. Code, § 1111).

4. Criminal law ☞510

Code section requiring corroboration of accomplice's testimony is mandatory, and conviction cannot stand unless accomplice's testimony is corroborated in accordance with standards laid down by courts in interpretation of statute (Pen. Code, § 1111).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

William Guihan was convicted of burglary, and he appeals.

Reversed.

Martin S. Ryan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

The defendant was convicted by a jury of the crime of burglary, and appeals from the judgment and from the order denying his motion for a new trial. His principal point on appeal is that the evidence is insufficient to sustain the verdict.

The information charged the defendant and also Lester Hobson, Peter D. Bout, and John H. Wright, with the burglary of a store from which seventy rugs were taken. The defendant Wright pleaded guilty to the charge, and the defendant Hobson made a confession to the police and also admitted the charge in his testimony at the trial. The district attorney dismissed the information against the defendant Bout, and thereafter called him as a witness for the people.

The testimony of Bout was that he saw Guihan and Hobson talking with Wright the night the rugs were stolen; that he did not hear the conversation, and that the three left in about 15 minutes; that he did not go into the rug store, but that some rugs were brought to Wright's car parked near the place and in which he was seated; and that he and Wright drove away with them. He further testified that he, in company with Wright, met Hobson and Guihan four or five days later. At that time, according to his testimony, either Guihan or Hobson said, when all four were present, "that they didn't have much trouble getting in, by taking a rock, throwing it on the glass, reaching inside with their arms and opening the door," and "that they had someone out selling the rugs already, they were expecting the money from it."

Except for Bout's testimony, there is no evidence connecting appellant with the crime except the testimony of two police officers relating statements alleged to have been made to them by appellant after he was arrested. According to one officer, when appellant was asked about the crime, "he said he would help us recover the rest of the rugs; we told him we had recovered about twenty rugs up to that time, and we told him there was about fifty outstanding, something like that; he said he would help

us recover the—but he wanted to talk to his attorney first before he made any statement." The officer did not testify to what he said to appellant at the time this statement was made. Another officer testified that, when appellant was in jail, he had a conversation with him. "I called him down, took him in the little side room and said to him, 'Well, Bill, what are you in here for now?' and he says, 'Well, it is just a dumb beef'; I says, 'Well, I will tell you, this man wants his rugs back, and you know me and I know you; let's get his rugs back to him'; and he said he wouldn't make any statement of any kind until he talked with his attorney. * * *" These statements, the appellant insists, are not sufficient corroboration of the testimony of Bout to sustain the verdict.

Bout was an accomplice, and a conviction cannot be sustained upon his testimony "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Pen. Code, § 1111.

[1,2] In determining the question of corroboration, the testimony of the accomplice must be eliminated from the case. *People v. Robbins*, 171 Cal. 466, 154 P. 317. This leaves no evidence to support the verdict of guilty except the statements of the defendant to the police officers. The meaning of the appellant's alleged statement that "it is just a dumb beef" is not shown in the record, and without explanation does not convey any meaning tending to connect him with the commission of the crime. The language used may be the equivalent of a positive denial of guilt. The defendant's other statement that "he would help us recover the rest of the rugs" falls far short of the amount of corroboration required by section 1111 of the Penal Code. Considering it in its most favorable light, it is consistent with the innocence of the accused, and as such cannot amount to corroboration. *People v. Robbins*, supra. At the most it raises only a suspicion of guilt, and more than mere suspicion is required.

[3,4] The question of the corroboration of an accomplice was discussed at length and the authorities reviewed in the case of *People v. Kempley*, 205 Cal. 441, 456, 271 P. 478, 485, where it is said: "The question of how much more than a mere suspicion is required in order to constitute

corroboration has been answered by many cases in declaring further that—'Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused.' *People v. Robbins*, 171 Cal. 466, 470, 154 P. 317; *People v. Woodcock*, 52 Cal. App. 412, 417, 199 P. 565; *People v. Janssen*, 74 Cal. App. 402, 407, 240 P. 799. The Code section is mandatory (*People v. Allison*, 200 Cal. 404, 253 P. 318), and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. 'The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the State's case depends solely upon his uncorroborated testimony.' *People v. Robbins*, 171 Cal. 466, 469, 154 P. 317, 318. If the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. *People v. Viets*, 79 Cal. App. 576, 587, 250 P. 588."

The evidence in this case does not measure up to what is legally required for corroboration. The judgment is reversed, and the order denying motion for new trial is reversed.

We concur: CONREY, P. J.; HOUSER, J.



7 Cal.App.2d 566

STOCKWELL v. FOSTER et al.

Civ. 9708.

District Court of Appeal, Second District,
Division 2, California.

June 13, 1935.

Rehearing Denied July 11, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

Mortgages 310

Where original agreement contemplated release from trust deed of acre parcels at fixed minimum price, while later agreement did not lower such price, but merely provided for release of smaller areas on payment of price which was proportionately higher than sum as originally fixed, consent of trust deed grantors, who had conveyed land to an-

other assuming indebtedness, to later agreement could be inferred from their consent to original agreement.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Albert Pike Stockwell against John B. Foster and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Swanwick, Donnelly & Proudfit, William B. Himrod, and Donald O. Welton, all of Los Angeles, for appellants.

Overton, Lyman & Plumb, Irving H. Prince, and Cecil A. Borden, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered a deficiency judgment against defendants following foreclosure of a trust deed, and the latter appeal.

In April of 1926, appellants executed a promissory note in favor of respondent and his wife (now deceased), and as security therefor executed and delivered a deed of trust to certain real property. Thereafter appellants conveyed the land to one Beesemyer, who assumed and agreed to pay the note, and who later conveyed the property to a corporation which did not assume or agree to pay the note.

Appellants protest that certain findings of the trial court are not warranted by the evidence. Attention is first directed to a finding that it was not true, as contended at the trial by appellants, that respondent or the bank to which he had pledged the note had agreed to or did extend the time of payment of the whole or part of the principal. The transcript, however, discloses evidence which justifies such a finding.

It is next suggested that the finding that appellants consented to an agreement as to the release of parcels of the land is improper. The original agreement contemplated the release and reconveyance of acre parcels at a fixed minimum price. The later agreement did not lower this price, but merely provided for release and reconveyance of smaller areas upon payment of a price which was proportionately higher than the sum as originally fixed. Such partial payment and release reduced the principal obligation while diminishing

the corpus of the trust. The modification of which complaint is made relates merely to the method of carrying out the express agreement originally made by appellants, and amounted to no more than a working schedule for carrying out the intention of the parties as first expressed. The consent of appellants may be inferred from the language of the original agreement signed by them.

The further finding that the sale of the real property under the trust deed was properly conducted is amply supported by the record.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 287

JACKSON v. PACIFIC ELECTRIC RY. CO.
Civ. 9987.

District Court of Appeal, Second District,
Division 2, California.
May 31, 1935.

Hearing Denied by Supreme Court
July 30, 1935.

1. Carriers ☞302(2)

Where motorist disregarding danger signals drove directly in front of interurban train and was struck by train, and particles of glass from automobile allegedly were blown into eyes of passenger of train who was sitting by open window, railroad held not liable to passenger, where motorman was not negligent.

2. Appeal and error ☞1170(7, 9)

Where all errors assigned by appellant were based on alleged misdirection of jury or improper rejection of evidence, and appellate court after careful examination of entire cause was of opinion that alleged errors had not resulted in miscarriage of justice, judgment would not be set aside (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Lilian R. Jackson, also known as Elizabeth R. Jackson, an unmarried woman, against the Pacific Electric Railway Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Frank C. Hoyt and Samuel A. Rosenthal, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the defendant in an action for damages for personal injuries alleged to have been received by the plaintiff as the result of the negligent operation by the defendant of an interurban train on which plaintiff was riding as a passenger. The train collided with an automobile driven by a third person at the intersection of La Brea avenue and Venice boulevard in the city of Los Angeles. Plaintiff claims that in the collision particles of glass from the automobile were blown into one of her eyes and that, as a result, both of her eyes were injuriously affected. The train involved in the accident was a westbound, two-car interurban train running from Los Angeles to Santa Monica. Plaintiff was sitting in a seat on the right-hand side of the car, in the smoking compartment, and next to an open window.

[1,2] From a point about 3,000 feet east of where the accident happened, thence westerly to the Pacific Ocean, defendant's tracks are on its private right of way, excepting where it is crossed by streets and public highways. Defendant's private right of way is effectively protected from vehicular traffic, and the ties and rails are exposed above the ground. There is installed at the said intersection a standard railroad crossing sign bearing the words "Railroad crossing, look out for the cars." Also, there are two wigwag signals which commence to operate when an approaching train has reached a point 900 feet from the crossing and continue to operate until the train has passed the intersection. The wigwag signals were so operating at the time of the accident. The whistle was sounded for the crossing in the usual way, and in addition thereto there were several short blasts of the whistle before the crossing was reached. The automobile involved in the accident approached along the highway from the south and passed to the left of other automobiles stopped at the crossing to allow trains to pass. The driver of the automobile disregarded all these danger signals

and drove directly in front of the train which struck it. The jury which heard the case returned a verdict in favor of the defendant.

Two doctors, whom plaintiff consulted immediately or soon after the accident, testified that she did not have any glass in her eye, and one of them said that a misplaced eyelash, which he removed, had caused the irritation in her eye. One doctor who examined her for the first time two weeks after the accident testified that he found glass in her eye and removed it. Plaintiff was 46 years old and had never worn eyeglasses. An eye specialist, who examined her on behalf of the defendant, testified that there is nothing the matter with her eyes excepting that she has reached the age that the lenses of the eyes begin to lose their elasticity and resilience so that they can no longer expand and contract to accommodate themselves to different conditions, and that all she needs is eyeglasses. Defendant's motorman did everything within his power to avoid the accident.

The defendant presented four defenses: First, that it was not guilty of any negligence; second, that the plaintiff, herself, was guilty of negligence in voluntarily putting her head outside of the window, thus contributing proximately to the injuries; third, that the accident happened solely on account of the automobile driver; and, fourth, that the plaintiff received no injuries resulting from the accident. There was evidence on which the jury well might have found for the defendant on any one or all of these defenses.

Appellant assigns several alleged errors, all on the ground of misdirection of the jury, or the improper rejection of evidence. However, after a careful examination of the entire cause, including the evidence, as required of us by the Constitution, we are of the opinion that the matters complained of where erroneous have not resulted in a miscarriage of justice. This seems to be a classic illustration of what the people had in mind when they wrote section 4½, article 6, into the Constitution, which reads, in effect, that no judgment shall be set aside on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained

of has resulted in a miscarriage of justice. Under this mandate we may not set aside the judgment.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 351

PEOPLE v. MEYERS.

Cr. 2714.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1935.

Hearing Denied by Supreme Court
July 1, 1935.

1. Criminal law ☞517(4)

Evidence held to sufficiently establish corpus delicti to justify admission of murder confession, notwithstanding absence of evidence connecting defendant with crime.

2. Criminal law ☞563

Identity of perpetrator of crime is not part of corpus delicti.

3. Criminal law ☞535(½)

Proof of corpus delicti, plus proof of defendant's confession, is sufficient to sustain conviction.

4. Homicide ☞18(5)

All killings occurring in perpetration of robbery are murder in first degree (Pen. Code, § 189).

5. Homicide ☞234(10)

Evidence showing that killing occurred in robbery of deceased's person held sufficient proof of corpus delicti of first degree murder, independent of confession, to support conviction of murder in first degree (Pen. Code, § 189).

6. Criminal law ☞517(4)

Prima facie proof of corpus delicti is sufficient to render confession admissible.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

James Meyers was convicted of murder in the first degree, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appellant was convicted of murder in the first degree for the killing of John D. Vernon on September 17, 1934.

It is first urged that there was no proof of the corpus delicti independent of the extrajudicial statements of the accused. It appears from the testimony of the autopsy surgeon that he found on the body of the deceased a laceration on the top of the head, a contusion over the left temporal region, an extensive swelling of the left cheek, a black and blue discoloration of the right eye and several lacerations on the lips and chin; that the cause of death was concussion of the brain due to violence; that the concussions were caused by either blows or falls; that, in order to get all the injuries in a fall, the head of deceased would have had to strike something capable of inflicting such injuries which would fit just exactly the contour of the head. The doctor also testified that, while deceased might have lived for some time after the injuries, it was not probable that he walked thereafter; that the laceration on the chin was administered by some instrument, but that he was unable to say whether the blow was struck with a fist or with a harder object.

The body of deceased when first discovered was entirely upon a bed, lying upon the face in a pool of blood. There were spots of blood near the head and small spots all the way up to the ceiling, on the wall about four feet south of the feet of the body, on the door of a closet, and on each side of a washbasin. There was no blood on the floor.

The evidence further discloses that in his first conversation after his arrest on September 18th appellant first denied knowing anything about the crime, but later stated that he made his living "rolling drunks"; that he and one Shoemaker followed deceased to his room, that Shoemaker hit the man once before he entered his room and that they then took what money they could find—a watch and a little purse—after which they went out the back way and threw "the stuff" underneath a stairway. Thereafter appellant admitted that he had committed the offense alone, and agreed to go to the room and re-enact

the manner in which it was done. He led the officers to the room of deceased, and upon arriving there stated that he had entered the room right behind the deceased with the intention of robbing him; that deceased sat on his bed and asked appellant what he wanted, to which the latter made no reply, but hit deceased on the side of the face with a pair of brass knuckles; that deceased tried to get up and appellant hit him again, whereupon deceased rolled over and fell on the bed, after which appellant went through the victim's pockets and removed his watch, a dollar bill, a purse containing a few cents and some papers, threw some papers out of the window, and left by the back way, throwing the stolen property under the stairway. In addition, appellant re-enacted the crime. It also appears that appellant denied that he had killed deceased. The police chemist found blood upon the shirt of appellant and in the material removed from under appellant's fingernails.

[1] The finding of the body lying upon the bed, the spatters of blood on the walls and on the side of the washbasin, the multiple cuts and abrasions on the head, the improbability of the deceased walking after his injuries, the pool of blood under the head, indicating that it fell to that position and remained there, and the absence of blood on the floor—even without the other evidence tending to the same conclusion—tell most eloquently the story of a man beaten to death by an assailant, and are wholly inconsistent with any such theory as that of death resulting from an accidental fall, as suggested by appellant. There was more than ample proof of the corpus delicti. *People v. Selby*, 198 Cal. 426, 245 P. 426; *People v. Murillo*, 119 Cal. App. 59, 5 P.(2d) 897; *People v. Wolcott*, 137 Cal. App. 355, 30 P.(2d) 601; *People v. Ybarra*, 68 Cal. App. 259, 228 P. 868; *People v. Durborow*, 130 Cal. App. 615, 20 P.(2d) 708; *People v. Clark*, 70 Cal. App. 531, 233 P. 980; *People v. Westlake*, 106 Cal. App. 247, 289 P. 212; *People v. Bonilla*, 114 Cal. App. 219, 299 P. 784; *People v. Coker*, 78 Cal. App. 151, 248 P. 542; *People v. Bollinger*, 196 Cal. 191, 237 P. 25.

[2, 3] Appellant seeks to make the point that there must, under the law, be evidence connecting the defendant with the crime other than the confession of the accused, and that there is here no such other evidence. It is well settled that the identity of the perpetrator of a crime is no part of

the corpus delicti [*People v. Cowling* (Cal. App.) 44 P.(2d) 441; *People v. Bonilla*, 124 Cal. App. 212, 12 P.(2d) 64; *People v. Flores*, 34 Cal. App. 393, 167 P. 413; *People v. Vertrees*, 169 Cal. 404, 146 P. 890; *People v. Wagner*, 29 Cal. App. 363, 155 P. 649; *People v. Moe*, 116 Cal. App. 740, 3 P.(2d) 354; 4 P.(2d) 234; *People v. Sameniego*, 118 Cal. App. 165, 4 P.(2d) 809, 5 P.(2d) 653; *People v. Garcia*, 101 Cal. App. 213, 281 P. 508; *People v. Strider*, 96 Cal. App. 632, 274 P. 601; *People v. Locurto*, 97 Cal. App. 185, 275 P. 462], and that proof of the corpus delicti plus proof of the confession of the defendant is sufficient to sustain a conviction [*People v. Emmett*, 123 Cal. App. 678, 12 P.(2d) 92; *People v. Ross*, 61 Cal. App. 61, 214 P. 267; *People v. Eldridge*, 72 Cal. App. 386, 237 P. 770; *People v. Ruef*, 57 Cal. App. 230, 206 P. 775].

[4-6] The remaining point is that the evidence will not sustain a conviction of first degree murder. Concretely this raises the question as to whether the evidence is sufficient to establish that the killing occurred in the perpetration of a robbery. All such killings are murder in the first degree. Pen. Code, § 189; *People v. Hendricks*, 129 Cal. App. 156, 18 P.(2d) 715; *People v. Anderson*, 1 Cal.(2d) 687, 37 P.(2d) 67. The brief of respondent declares that "the only evidence from which the degree of the crime in this case can be fixed is the defendant's own admissions." A reading of the transcript, however, discloses that, when the body was found, the deceased's pockets were empty and turned inside out, a 10-cent coin was found lying upon the bed and another 10-cent coin was just outside the window on the light well, together with several letters addressed and belonging to the deceased, a membership card in the "540 Club Cafe" bearing the signature John D. Vernon, and a receipt for dental services rendered to "John Vernon." Underneath the steps at the back of the building were found two envelopes (introduced in evidence but only partially described) and a tooth paste package; an empty pocketbook was lying outside of the steps, a watch was outside upon the bank above the steps, and a pocket-knife and key were found in an ash pile behind the steps.

Taking the circumstances as a whole, they warrant the inference, and constitute prima facie proof, that the deceased was

not only beaten to death but that he was robbed of his possessions, his pockets emptied and left pulled out, and letters and other property of the victim thrown away by his assailant. Prima facie proof of the corpus delicti is sufficient to render admissible the voluntary confessions and admissions of the accused, "and, having been so properly admitted, they may, with the evidence aliunde, be considered by the jury in its determination whether or not all the elements of the crime and the connection therewith of the accused have been established to a moral certainty and beyond all reasonable doubt." *People v. Selby*, 198 Cal. 426, 436, 245 P. 426, 431, followed in *People v. Domenighini*, 81 Cal. App. 484, 254 P. 292; *People v. Coyle*, 81 Cal. App. 671, 254 P. 597. There was ample proof herein of the corpus delicti of murder in the first degree, independent of the extrajudicial declarations of appellant, and this proof, coupled with the confession of the accused, is sufficient to support the verdict and the judgment.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 294

CUMMINS v. CUMMINS (two cases).

Civ. 5275, 5276.

District Court of Appeal, Third District,
California.

May 31, 1935.

1. Appeal and error ⇨931(1)

On appeal evidence of prevailing party in trial court must be accepted as true.

2. Husband and wife ⇨232(3)

In husband's action to set aside deeds to wife made pursuant to reconciliation agreement after wife's action for divorce, finding that neither party understood force and effect of agreement held sustained by evidence (Civ. Code, §§ 1576, 1578, subds. 1, 2).

3. Husband and wife ⇨232(3)

In husband's action to set aside deeds to wife made pursuant to reconciliation agreement after wife's action for divorce, facts that wife asked husband to sign and stated that she would do right by him, that

wife subsequently began divorce proceeding on husband's resumption of abuse, and that former action was never formally dismissed, though wife instructed her attorneys to do so and their motion to dismiss was granted *held* insufficient to sustain finding that husband's signature to agreement and deeds was procured by fraud, that wife had refused to perform agreement, and that consideration for agreement and deeds had failed.

4. Husband and wife ⇨39, 47(3)

Love and affection *held* sufficient consideration to support reconciliation agreement and deeds to wife after wife's action for divorce.

5. Husband and wife ⇨232(3)

Finding that neither party to reconciliation agreement and deeds to wife, after her action for divorce, understood force and effect of agreement *held* sufficient to sustain judgment setting aside deeds, though evidence was insufficient to support all findings made (Civ. Code, §§ 1576, 1578, subs. 1, 2).

6. Divorce ⇨280

Where interlocutory decree of divorce provided that certain property should become wife's separate property on final decree, appeal from interlocutory decree *held* proper method of raising question of court's power to make such decree.

7. Divorce ⇨286

Where in divorce action wife claimed that certain property was her separate property and husband claimed that it was community property, and court found property was community property, husband could not on appeal claim that property was his separate property.

8. Husband and wife ⇨249

Conveyance to husband and wife as joint tenants does not necessarily preclude their holding it as community property.

9. Husband and wife ⇨254

Where property was purchased with community funds and both spouses intended that it should be community property, though held under joint tenancy deeds, it was community property.

10. Husband and wife ⇨266

Where community property was deeded to wife following reconciliation agreement and deeds were subsequently set aside in action by husband, property thereupon became community property.

11. Divorce ⇨307

Award of \$75 monthly to divorced wife for support of child for three years and \$50 monthly thereafter during child's minority *held* sustained by evidence.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Separate actions by Grover C. Cummins against Sue Cummins, and by Sue Cummins against Grover C. Cummins who filed a cross-complaint. From judgments for plaintiff in each action, the defendants appealed and appeals were consolidated.

Judgments affirmed.

Carlos S. Hardy, of Los Angeles, for appellant-respondent Sue Cummins.

Fred W. Morrison, of Los Angeles, for respondent-appellant Grover C. Cummins.

Mr. Justice pro tem. PAULSEN delivered the opinion of the court.

These actions, in which the parties are husband and wife, were tried upon the same evidence and were consolidated for the purposes of the appeals.

Before considering the cases separately or the several points involved therein, certain facts which relate to both cases should be stated.

The parties owned two houses and lots in Hollywood, Cal., the title to which was held under joint tenancy deeds, and one house and lot in Portland, Or., the title to which stood in the name of the husband. They had about \$8,000 on deposit in a Texas bank in the husband's name, and an automobile registered in the name of the wife. In addition, they owned the household furnishings of the home in Hollywood, and certain other personal property that was used in shows and carnivals. All this property had been acquired during the marriage by the efforts of the parties.

On August 27, 1931, the wife left the family home, taking her minor son with her, and secured quarters at an hotel. On the same day she filed suit for divorce charging the husband with extreme cruelty. A restraining order was issued against the husband enjoining him from molesting the wife and minor child, from visiting or interfering with the wife's possession of the family home, from conveying or encumbering any of the community property, from collecting rents, and from withdrawing any of the funds on deposit in the bank.

After service of the divorce complaint, summons, and restraining order upon him, the husband went to the hotel where the

wife and son were staying and endeavored to see her. She refused to see him or talk with him. He then called upon her attorney and through him secured a meeting with his wife. When this was done, he sought a reconciliation, begged her to drop the divorce action and return home. He offered on his part to stop drinking intoxicating liquors, to desist from further abuse of her, and agreed to act in the future as a loving and considerate husband. The wife declined to accept these overtures, insisted that she had endured years of abuse and cruelty, demanded a divorce, and half of the community property for herself and custody of the minor child. The husband then offered to convey all of the community property to her and to grant other concessions if she would forgive him and return. The wife continued her refusal, stating that she "wanted a divorce and half of the property—that which the law would give her." The husband repeated many times his offer to give her all the property, and, finally, through the intercession of the proprietress of the hotel, who was a mutual friend, a tentative agreement for reconciliation and settlement of property rights was effected. On September 1, 1931, the parties entered into a written agreement by which the husband agreed to convey the Hollywood and Portland properties to the wife, to pay her half of the money in the Texas bank, to give her a monthly allowance of \$150, to pay the fees and expenses of attorneys, to discontinue his excessive drinking, and refrain from other objectionable conduct toward his wife. The contract also contained the following provisions: "Sue Cummins agrees to cause the said divorce action to be dismissed and agrees further that until said action is dismissed, the order to show cause heretofore made in said action against Grover C. Cummins, which is set for hearing on September 4th, 1931, shall be continued, and no further action taken by Sue Cummins with respect to said divorce action, except to have the same dismissed upon the full completion by Grover C. Cummins of the obligations assumed by him herein with respect to the execution of this agreement and the delivery of the conveyance above provided for, and the payment of the said one-half of the moneys on deposit in the bank, and the payment of said attorney's fees and expenses. * * * Consideration to the said Grover C. Cummins from Sue Cummins for the making of this agreement and said convey-

ances and the transfer of said money, is the love and affection Grover C. Cummins has for his said wife, Sue Cummins, and her agreement to forgive him the indignities and wrongs inflicted upon her, and to resume marital relations with him, and to dismiss her said divorce action." Pursuant to this agreement, the husband conveyed the property in question to one of the wife's attorneys, who subsequently conveyed it to her. He also gave her half of the money in the bank and paid the attorney's fees and expenses.

The parties returned to their home, and for about three weeks enjoyed "a second honeymoon." Thereafter, trouble arose, and in March, 1932, they again separated. On March 10, 1932, the husband filed this action to set aside the deeds. The wife thereupon filed a new suit for divorce, charging the husband with extreme cruelty and many abuses, some of which were alleged to have happened prior to the date of the reconciliation agreement. In the action to set aside the deeds, judgment was rendered for the husband, and the wife appeals therefrom. This appeal will be considered first, but it should be noted here that the wife was successful in the divorce action, the court finding that her allegations of cruelty were true; that she was therein granted a divorce, the custody of the minor child, and allowance for his support. The court there found the property above mentioned to be community property and awarded it to the wife in lieu of alimony.

In the first action, wherein the wife is the appellant, the court found, among other things, that the reconciliation agreement of September 1, 1931, "was not entered into by either of the parties with an understanding of the force and effect of the contract, and of the deeds executed pursuant thereto, by either of the parties thereto, and the signature and agreement of the plaintiff to said agreement and deeds was obtained by fraud and misrepresentation, and that plaintiff and defendants have each failed and refused to comply with the terms and conditions on the part of each to be performed, and that the consideration for the making, executing and delivering of said agreement and the conveyances to the property transferred to defendant has wholly failed." Appellant contends that these findings are not supported by the evidence.

Both parties admit that property settlements made for the purpose of bring-

ing about a reconciliation between husband and wife are favored by the law; also, that contracts and conveyances between husband and wife are vitiated by fraud and misrepresentation, misunderstanding of the parties, or failure of consideration, the same as contracts and conveyances between strangers. The sole dispute on this appeal is as to the interpretation and application of the evidence.

Is there support in the evidence for the finding that the agreement "was not entered into by either party with an understanding of the force and effect of the contract?"

It will be observed that this finding does not purport to deal with a mistake of fact. Indeed, respondent contends that it is justified because he did not understand that the transaction would affect the community status of the property. He testified that he knew what community property was; that prior to this transaction he held it as community property; and that it was his belief that the conveyance would vest the record title in his wife without changing the community character of the property conveyed. With this in mind, the question may be stated thus: Was there sufficient evidence to prove a mistake of law such as would warrant the relief granted?

Under proper circumstances, relief may be granted because of a mistake of law. Civ. Code, § 1576. Section 1578 of the same Code provides: "Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:

"1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

"2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

[1] It is at once apparent that the finding was intended to bring the case within the terms of subdivision 1 of said section and that evidence which tends only to support the rule laid down in subdivision 2 thereof is not to be considered. Respondent testified: "At school I only went through the third reader. I can read printing if I spell it out. Some words I understand, and some I don't. I relied upon what Judge Hardy (appellant's attorney) and my wife told me. I read Exhibit 5 (the agreement) as best I could. I said:

'Half of the property is yours.' She said: 'It is in your name, all in your name.' I told her: 'I would deed the property to her in good faith, show you I mean well—didn't make no difference whether the property was in her name or my name, it was still community property.' I knew what community property was. I did not read the deeds and they were not read to me. I would not have signed the agreement or deeds in Judge Hardy's office on September 1st, 1931, if I had known that they gave the property entirely to Mrs. Cummins without any right to me in it. I was willing to put the property in her name to hold as community interest as I had held it. Judge Hardy asked if we had decided to settle it, and Mrs. Cummins answered and said, 'That I had agreed to give her all the property in her name and half the money,' and I said, 'Yes, sir.'" With the exception of the facts as to the respondent's schooling, all these statements are disputed by the other witnesses. However, we must accept them as true for the purpose of this appeal.

[2-5] The record shows that when respondent first called upon appellant at the hotel she refused a reconciliation, stating that she wanted "a divorce and half of the property—that which the law would give her." There was a conversation at that time regarding the fact that all the property stood of record in the name of respondent and it was in connection with this subject that respondent claims he offered to convey it to appellant, that she might hold the title. Our attention has not been called to any testimony of the wife directly stating that she understood that the conveyances would vest the title in her as her separate property. There was other testimony strongly tending to support appellant's contentions on this point, but at most it only created a conflict in the evidence which the trial court resolved against her. The evidence is presented on a bill of exceptions. The answers given by the witnesses must be considered without reference to the questions asked, and often separated from their context. The trial judge heard the witnesses testify; observed their manner on the stand; heard the questions as well as the answers, and was aware of the testimony immediately preceding such answers. We cannot say under such circumstances that he was not justified in finding that appellant did not understand the force and effect of the conveyances.

The finding that "the signature and agreement of plaintiff to said agreement and deeds was obtained by fraud and misrepresentation, and that plaintiff and defendant have each failed and refused to comply with the terms and conditions on the part of each to be performed, and that the consideration for the making, executing and delivering of said agreement and conveyances to the property transferred to defendant has wholly failed" is not supported by the evidence. Respondent testified that when he hesitated to sign his wife said: "Go ahead and sign; I will do right by you." This is not evidence of fraud in procuring the signature. But he contends that the fraud arose from the fact that appellant induced him to sign while she had no intention of performing on her part. Respondent's own testimony shows that appellant returned to him, and for three weeks thereafter, and until he commenced to abuse her, performed all the duties of a faithful and loving wife. In the divorce action the court found that his cruelty commenced at that time, and because of it, judgment was rendered for the wife. Under such circumstances, her refusal to submit to further abuse and mistreatment cannot be considered as evidence of an intention, at the time of making the agreement, not to perform.

It further appears that there was never a formal dismissal of the first divorce action, but the evidence is uncontradicted that on September 14, 1931, appellant notified her attorneys, in writing, to have it dismissed; that on the following day they appeared in court, moved to have it dismissed; and that the motion was granted. Under these circumstances, the failure to enter a formal dismissal is a mere technicality that should not be charged against appellant.

Neither are we impressed with the argument that there was a failure of consideration. The agreement and deeds recited that they were made in consideration of love and affection. This has always been considered a sufficient consideration between husband and wife. *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691. "Where dissension exists between a husband and wife, and they have become estranged on that account, the execution of a conveyance of property from the husband to the wife, which is free from fraud or undue influence, made as an inducement for reconciliation, harmony, and the renewal of

marital relations, constitutes a sufficient consideration for the execution of the instrument." *Chadwick v. Chadwick*, 95 Cal. App. 690, 273 P. 86, 90; *Estate of Cover*, 188 Cal. 133, 204 P. 583. Respondent argues that the real consideration for the conveyances was the agreement of appellant to forgive him the indignities and wrongs inflicted upon her, and to resume marital relations with him. Appellant did forgive respondent and did resume marital relations. Her failure to continue to do so resulted from the cruelties of respondent, and not, so far as the evidence reveals, from any desire to avoid her obligations under the contract. It would be strange, indeed, if the law should compel a wife to remain with a husband under these circumstances under penalty of losing her property. Appellant's agreement to resume marital relations was made in view of an agreement upon his part to treat her with consideration in the future. To hold that her refusal to live with him longer had resulted in a failure of consideration would be to hold that respondent might take advantage of his own wrong.

Other points are raised on this appeal but what we have said makes it unnecessary to discuss them. Although the evidence may have been insufficient to support all the findings under attack, the finding that neither party understood the force and effect of the acts in question is sufficient, alone, to support the judgment.

The second appeal is taken by the husband from parts of the decree in the divorce action. No attack is made on that part of the decree granting the wife a divorce or awarding her the custody of the child. All the real property and certain personal property was awarded to the wife and the husband was directed to pay to the wife, for the support of the child, the sum of \$75 per month for three years and the sum of \$50 per month thereafter during his minority. The child was fifteen years of age in April, 1932.

Appellant first questions the authority of the court to award all the real property to the wife, contending that part of it was his separate property. In support of this he calls attention to the fact that the Hollywood property was conveyed to the parties as joint tenants and argues that under the ruling in *Siberell v. Siberell*, 214 Cal. 767, 7 P.(2d) 1003, the respective interests of the parties were held by them as separate property.

[6] Preliminarily, it should be said that respondent does not admit that the court awarded the property to her as her separate property, but states that she is simply given the use and income. The interlocutory decree provides that "Sue Cummins is entitled, in lieu of any award for her support and maintenance, to a judgment awarding to her the possession, use and income from the real estate herein described, and entitled to a judgment assigning and awarding to her in and by any final decree of divorce which may be entered herein, as and for her own separate use and estate, the real estate described," etc. This contemplates that the property shall become the separate property of the wife upon entry of the final decree. This appeal is the proper method of raising the question as to the court's power to make such a decree.

[7] The case was tried upon issues raised by the wife's complaint, and by the husband's cross-complaint. The complaint alleged that the property in question was her separate property. These allegations were denied by the answer. The husband's cross-complaint alleged that the property was community property and these allegations were denied by the answer to it. The court found that all the allegations of the cross-complaint were true. In this state of the record, appellant cannot complain of the finding simply because there were deeds in evidence showing that the property had been acquired under joint tenancy deeds. He did not seek to amend his cross-complaint, but throughout the trial relied upon the issues as framed by him, and testified that the property was community property; that it had been acquired during marriage by the efforts of the parties. He cannot contend otherwise for the first time on appeal.

[8-10] Moreover, a conveyance of property to a husband and wife as joint tenants does not necessarily, and under all circumstances, preclude the idea of their holding the same as community property. The case of *Siberell v. Siberell*, supra, relied upon by appellant, was decided solely upon evidence that the property had been purchased with community funds and was deeded to the parties as joint tenants. There was no evidence, other than this, to indicate the intention of the grantees. In *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.(2d) 513, 514, the court, referring to the *Siberell* Case, said:

"This court has recently determined that, *in the absence of any evidence of an intent to the contrary*, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deemed severed by consent, and the interest of each spouse therein is separate property." (Italics ours.) In both the *Siberell* and *Delanoy* Cases the contest was between one spouse and a third party. Aside from the joint tenancy deed and the evidence of purchase from community funds, there was no evidence in those cases to show intention of the parties as to the status of the property. Here we have the testimony of both the husband and wife. The wife testified that it was community property before the deeds were executed under the reconciliation agreement. When these deeds were set aside, this property was restored to its original character. Appellant testified that it was community property both before and after the execution of such deeds and was such at the time of trial. In the presence of such undisputed evidence of both owners, there can be no question of their intention to hold the property as community property regardless of the terms of the joint tenancy deed.

[11] Appellant also contends that the award for the support of the child is excessive. Appellant testified that he had been in the carnival business for thirty years and had made good money at it. The evidence showed that respondent's only income was \$50 a month from the rent of one of the houses. At the time of the settlement agreement appellant voluntarily agreed to convey the property to respondent and pay her \$150 a month in addition, for the support of herself and the child. At the time of the trial of this action, there was a question whether the Texas bank could pay the money respondent still has on deposit there, but, considering all the facts, we cannot say that the award for the child is excessive. The court is always open to respondent if he can show facts justifying a reduction in the amount awarded.

For the foregoing reasons, the judgment in each of said cases should be, and the same is hereby affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

7 Cal.App.2d 252

**McDEVITT et al. v. BUTTE CITY RANCH
et al.**

Civ. 9153.

District Court of Appeal, First District,
Division 1, California.

May 29, 1935.

Hearing Denied by Supreme Court
July 25, 1935.**1. Licenses ⇨26**

Under Corporate Securities Act making surety on licensed broker's bond liable for "loss" suffered by reason of broker's failure to comply with act, surety would be liable in action for rescission of contract to exchange securities for trust certificates offered by brokers on ground of fraud, since court in action for rescission for fraud can enter alternative judgment for value of property which defendant is required to restore, which is "loss" referred to in statute and is measure of surety's liability (St. 1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Loss," see Words & Phrases.]

2. Cancellation of instruments ⇨57

In action for rescission based upon fraud, court can enter alternative judgment, amount of which is based upon value of property defendant is required to restore.

3. Licenses ⇨26

As respects liability on licensed broker's bond, whether defrauded party rescinded contract with reasonable promptness was primarily for trial court (St. 1917, p. 673, as amended).

4. Appeal and error ⇨1008(1)

Appellate court will not interfere with trial court's determination of whether defrauded party rescinded contract with reasonable promptness, unless manifest injustice has been done.

5. Cancellation of Instruments ⇨34(1)

Defense of laches should not be entertained in action for rescission of contract unless it would be inequitable to deny defense.

6. Appeal and error ⇨1008(1)

Finding that injured parties to contract to exchange securities for trust certificates rescinded contract within reasonable time would not be disturbed by appellate court, notwithstanding that trust certificates had been in hands of injured parties for eleven months before notice of rescission was given.

7. Licenses ⇨26

Surety on broker's bond held liable in action to rescind, on ground of fraud, contract to exchange securities for trust certificates offered by brokers, notwithstanding that broker whom surety bonded acted jointly throughout entire transaction with another broker, since each joint fraud feisor is responsible for ensuing wrong, regardless of his degree of activity (St. 1917, p. 673, as amended).

8. Contracts ⇨271

Notice of rescission of contract to exchange securities for trust certificates offered by two brokers who acted jointly throughout entire transaction on ground of fraud was properly addressed to brokers jointly.

9. Licenses ⇨26

Surety on broker's bond held liable in action to rescind, on ground of fraud, contract to exchange securities for trust certificates offered by brokers, for interest on amount of loss sustained by plaintiffs from date of notice of rescission, where securities transferred to brokers had fixed value (St. 1917, p. 673, as amended).

10. Licenses ⇨26

Person who induced plaintiffs to enter into contract to exchange securities belonging to plaintiffs for trust certificates offered by person inducing contract held "broker" within Corporate Securities Act, where trust certificates had been purchased by person inducing contract for purpose of reselling to plaintiffs, as respects liability of surety on statutory broker's bond of person inducing contract in action to rescind contract for fraud (St. 1923, p. 89, § 2).

[Ed. Note.—For other definitions of "Broker," see Words & Phrases.]

11. Licenses ⇨26

Notice of rescission of contract to exchange securities owned by mother and daughter for trust certificates offered by brokers, in name of mother alone, was sufficient, notwithstanding that trust certificates were made out in name of both mother and daughter, where mother was acting for daughter in giving notice, and brokers were not misled by notice.

12. Appeal and error ⇨169

Matters not brought to attention of trial court would not be considered by District Court of Appeal.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Mary McDevitt and another against the Butte City Ranch, a voluntary trust, the Aetna Casualty & Surety Company, and others. From the judgment,

the Ætna Casualty & Surety Company appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant Ætna Casualty & Surety Co.

Vincent W. Hallinan, of San Francisco, for respondents.

TUTTLE, Justice pro tem.

Plaintiffs seek by this action to rescind a contract whereby they were induced, through fraud, to exchange their own securities for trust certificates offered by two of the defendants, who were brokers and gave bonds in defendant surety companies under the Corporate Securities Act. Rescission was adjudged, and, upon failure of defendants to return plaintiffs' securities, judgment was rendered against the surety companies in the sum of \$4,000, their value, with interest amounting to \$1,953.80. The sole appellant is defendant Ætna Casualty & Surety Company, and the appeal is taken from the judgment.

In November, 1924, defendants Norris and Bagnall were licensed brokers under the Corporate Securities Act (St. 1917, p. 673, as amended). Appellant was a surety on the bond given by Norris under the terms of said act. The trial court found that Norris and Bagnall induced plaintiffs, through certain false and fraudulent representations, to part with securities of a value of \$4,000 for securities which were of no substantial value whatever, with a resulting loss to plaintiffs of \$4,000. The complaint sets forth the fraudulent representations, avers that notice of rescission based on that ground was duly given, and prays for a cancellation of the sale and a return of the securities.

[1,2] It is first contended that appellant surety company is not liable in an action for rescission where the statutory bond is given under the Corporate Securities Act. This point was decided adversely to appellant's contention in the case of Hogberg v. Landfield, 99 Cal. App. 360, 278 P. 907, where it was held that the sale of securities by a licensed broker, accomplished through false and fraudulent representations, is a noncompliance with the provisions of the Corporate Securities Act, and that the surety on the broker's bond is liable for any loss suffered by any and all persons, where such loss is occasioned

by reason of the broker's failure to comply with the act. This right of action exists by virtue of the terms of the statute. Appellant seems to overlook the rule that in an action for rescission based upon fraud the court may enter an alternative judgment, the amount of which is based upon the value of the property which defendant is required to restore. Marks v. Howkins, 55 Cal. App. 664, 203 P. 1035. The amount of such money judgment is the "loss" referred to in the statute, and this is the measure of liability of the surety.

[3-6] It is contended that plaintiffs failed to rescind with reasonable promptness. The determination of this matter was a question primarily for the trial court in the exercise of a sound discretion, having in view all the facts and circumstances of the particular case, and appellate courts will not interfere with the conclusions drawn below, unless a manifest injustice has been done. This is the rule as stated in the case of Bryan v. Baymiller, 95 Cal. App. 481, 272 P. 1106, and numerous other cases therein cited. "A right of action to rescind a contract for fraud, false representations, mistake, or other cause, does not accrue until the injured party acquires knowledge of the facts on which his claim for relief may be based." Black on Rescission and Cancellation, vol. 2 (2d Ed.) p. 1324. Two of the false representations relied upon were that the securities delivered by defendants were first mortgage bonds, and that they bore interest at the rate of 8 per cent. per annum. It is pointed out by appellant that these securities were in the possession of plaintiffs for some eleven months before the time of rescission. It argues that plaintiffs could, by reading these certificates, readily ascertain the truth or falsity of these representations at any time during this eleven months, and that, under such circumstances, they must be charged as a matter of law with laches for their failure to rescind more promptly. As the cases hold, this matter was one for the trial court. The degree of intelligence of plaintiffs, their capacity for understanding the language of these securities, the fact that they may have relied so implicitly upon the representations that it never occurred to them to resort to reading the language of the certificates—all of these matters were available to the court in the matter of the exercising of its discretion. Furthermore, "the defense of laches * * * should not be entertained unless it is made to ap-

pear that it would be inequitable to deny it." Black on Rescission and Cancellation, vol. 2 (2d Ed.) p. 1348. No contention of such resulting inequity is here made. We hold that the question of what is a reasonable time within which to rescind is one of fact, and are therefore not disposed to interfere with the finding that plaintiffs rescinded with reasonable promptness.

[7,8] Appellant contends that it is being held liable not only for the acts of the broker whom it bonded, defendant Norris, but also for the acts of the other broker, defendant Bagnall. The trial court held that throughout the entire transaction they acted jointly; that is, the two names appear as the actors throughout. It appears from the evidence that the exchange transaction was not consummated on one occasion, but during two meetings several days apart. The testimony of plaintiff Mary McDevitt, is that these two defendants "were always together." The record indicated very clearly that in this scheme to defraud, these defendants worked in concert, and with a degree of "team work" which would put a first-class football team to shame. The fact that the other defendant conspired with defendant Norris certainly cannot operate to relieve the latter from full responsibility of the joint acts. Each joint fraudfeasor is responsible for the ensuing wrong, regardless of his degree of activity. *Lewis v. McClure*, 127 Cal. App. 439, 16 P.(2d) 166. So, also, the notice of rescission was properly addressed to these defendants jointly.

[9] The trial court allowed interest upon the amount of the loss, \$4,000, from the date of the notice of rescission, November 25, 1925. Appellant claims that the demand was "unliquidated," and interest should therefore commence from the date of the judgment; citing *Perry v. Magnuson*, 207 Cal. 617, 279 P. 650. The action in that case was against the surety upon a construction bond. Obviously, the claim was uncertain and unliquidated, as the person liable did not know what he owned and therefore could not be in default for not paying. Such demands remain uncertain until fixed by accord or judgment. In the instant case, the securities transferred to defendants had, according to the evidence and findings, a value of \$4,000. This presumably must have been known to defendants Norris and Bagnall when they gave plaintiffs their worthless paper. They therefore knew just the amount in which they were liable in the event their fraud

was uncovered. The surety stands in no better position than its principal, and it is liable under the act for all loss occasioned by the broker through a failure to comply with its terms. Plaintiffs suffered loss not only of the value of the securities, but also the interest upon their value. Surely it cannot be contended that the amount of the loss was liquidated as to the broker and yet unliquidated as to his surety. If the plaintiffs had paid \$4,000 cash for the securities offered by defendants, and rescinded and secured judgment for that amount so paid, they would have been entitled to interest on such amount from the date of their demand for a return. *Knight v. Bentel*, 39 Cal. App. 502, 511, 179 P. 406. If interest is allowed for money so paid, it follows that it should be allowed upon the value of property such as is here involved.

[10] Appellant contends that defendant Norris was not a broker in this transaction, but the owner of the certificates he sold to plaintiffs, and hence not liable under the holding in the case of *Pollak v. Staunton*, 210 Cal. 656, 293 P. 26. The Corporate Securities Act, St. 1917, p. 673, § 2, as amended by St. 1923, p. 89, includes in the definition of a "broker" every person engaged in the business "of purchasing such 'securities' with the purpose of re-selling them." While it does appear that Norris and Bagnall purchased these securities from defendant Butte City Ranch, it also appears that such purchase was made for the purpose of reselling to plaintiffs. We are of the opinion that under such circumstances Norris and Bagnall were "brokers" and that the transaction came within the purview of said act.

[11,12] Fault is found with the details of the rescission. Plaintiffs were mother and daughter, and they were dealt with jointly, by the brokers. A portion of the securities was in the name of the mother, and a part in the name of the daughter. Notice of rescission was given, through her counsel, by the mother alone for the return of all such securities. The securities delivered to plaintiffs were made out in both of their names. There is sufficient evidence in the record to uphold a finding to the effect that the mother was acting for both in giving the notice. Certainly the defendant brokers could not have been misled by such a demand and notice. Furthermore, matters of this character were not brought to the attention of the trial

court, and are not entitled to consideration here.

Other points urged for a reversal have been given consideration, but we find they lack sufficient merit to warrant further discussion.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.



7 Cal.App.2d 507

GORMAN v. STEINKE.
Civ. 8868.

District Court of Appeal, Second District,
Division 1, California.
June 12, 1935.

1. Fraud ☞58(2)

Evidence of alleged false representation in that practically all business of insurance agency sold was secured direct and not from brokers held not sufficiently clear and convincing to establish fraud in contract for sale of agency where purchaser knew facts, and amount of commissions was correctly stated, and purchaser received exactly what he purchased.

2. Fraud ☞50

Fraud is never presumed, and it is incumbent upon one relying thereon to establish it.

3. Fraud ☞58(1)

To establish fraud, evidence must be clear, satisfactory, and convincing.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by D. A. Gorman against E. J. Steinke, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed.

Doyle, Clark, Thomas & Johnson, of Long Beach, for appellant.

John H. Burke, of Long Beach, for respondent.

PER CURIAM.

Plaintiff sued for damages arising out of the alleged fraudulent representations of the

defendant in the sale of an insurance agency business, and had judgment upon the verdict of a jury. The principal ground urged by the defendant on appeal from the judgment is that the evidence is insufficient to support the verdict.

The sale of the business was made in January, 1930, under a written contract executed after negotiations extending over several days. By the contract "the said E. J. Steinke agrees to set over to D. A. Gorman the good will of said insurance agency and to use his best efforts to place the said D. A. Gorman in profitable contact with all customers of said insurance agency and E. J. Steinke represents that he has not withheld any contract or understanding had with others or with salesmen, brokers and/or customers which would be prejudicial to the proper and profitable conduct of said insurance agency by D. A. Gorman and that all business, renewals and confidential data of said insurance agency belongs to said office and no salesman, broker or customer has any right, title or interest therein." In his complaint, respondent alleged "that the said defendant did not use his best efforts to place the plaintiff in proper and profitable contact with all customers of said defendant and did not intend so to do at the time said promise was made so to do, and the statements of the defendant and the representations of the defendant that he had not withheld any contract or understanding had with others, or with salesmen, brokers and/or customers which would be proper and profitable to the conduct of said insurance business, and that all renewals, business and confidential data of said insurance business belonged to said defendant, and that no salesman, broker or customer had any right, title or interest therein, were false and fraudulent; * * *" The contract also provided that the appellant would not engage in the insurance business in Long Beach for a period of ten years, and in a second count of the complaint it is alleged that appellant violated that agreement and respondent has been damaged thereby. Only one verdict was returned, which was in general terms for the respondent in the sum of \$5,000, and for the appellant in an amount of \$136.08 on his cross-complaint for commissions on new business he placed with the respondent after the sale.

[1] Most of the controversy arises over the claim of the respondent that appellant

represented to him that practically all of the business of the agency was direct business, that is to say, secured from the insured directly and not through brokers, and that this was untrue. However, the evidence fails to support respondent's contention. Respondent testified that appellant represented to him that the gross premiums of the insurance agency had amounted to \$180,000 in the previous year, and that this business produced \$23,674 in commissions for the agency after paying all brokerage and commissions to which others were entitled. Some months after respondent purchased the business he had an audit made which showed that the commission income of the agency for the year was \$22,875. Respondent testified that at the time of giving him the amount of commissions, appellant had stated that the bookkeeping was not quite up to date, and an annual audit was in progress, consequently tentative figures only could be given at that time. In view of these explanations by appellant, his figures were as accurate as could reasonably be required in representing the gross profits of the business.

It is difficult to see how even an untrue representation as to the amount of direct and brokered business could result in any damage to the buyer of the agency where the total commission income was correctly stated. The claim of respondent in this regard is based upon his assertion that the business secured from brokers and promised by the salesman did not "belong" to the agency within the meaning of the contract. But he knew that appellant had salesman employed, and he also knew that appellant accepted business from brokers. The amount of commission represented by appellant to have been secured by him on a total gross premium income of \$180,000 must have told respondent, as an experienced insurance man, that a considerable portion of the business came from persons to whom appellant paid a portion of the commission. Under such circumstances, the provision of the contract that the business belonged to the appellant must be construed in the light of the knowledge of both parties, and could only have been taken by the respondent to mean that no person had any interest in the business which would reduce the amount of the commission below that represented, if the same persons did business with the insurance agency in the future in the same way they had in the past. There is no substantial evidence that

all of the business of the agency was not owned by the appellant. On the other hand, the evidence shows that the appellant got exactly what he purchased, an insurance agency with a gross premium income of \$180,000 and a commission income of \$23,000. Under such circumstances there was no foundation for opinion evidence that the business was of less value than represented.

The further claim of the respondent that the appellant failed to assist him in keeping the business is without any substantial foundation.

[2, 3] Fraud must always be proved. It is never presumed, and it is incumbent upon one relying upon fraud to establish it. There is here no evidence of fraud, nor any evidence from which fraud may even reasonably be inferred. "It is never presumed that a party has committed a fraud, and, where fraud is alleged for the purpose of depriving him of a right, it must be clearly made out. [Citing cases]. To establish fraud the evidence must be clear, satisfactory, and convincing." *Wolfe v. Severns*, 109 Cal. App. 476, 480, 293 P. 156, 158. Here the evidence not only fails to measure up to this standard, but, on the contrary, shows without contradiction that the representations made by the appellant were true.

The judgment is reversed.



7 Cal.App.2d 258

**SPRING VALLEY CO., Limited, v. JOHN-
SON, State Treasurer.**
Civ. 9631.

District Court of Appeal, First District,
Division 1, California.
May 29, 1935.

Rehearing Denied June 28, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Taxation ☞37

Bank and Corporation Franchise Tax Act held not unconstitutional in so far as it purports to authorize tax upon corporation upon basis of its net income for next preceding fiscal or calendar year, since constitutional provision that taxes shall become lien on first Monday in March of 1929 and of each year thereafter contemplates tax to be levied and

collected in 1929, which would only be possible if net income of previous year was used as its basis (St. 1929, p. 20, § 4; Const. art. 13, § 16, subds. 2 (a), 5).

2. Taxation ⇐37

In substituting one form of taxation upon corporate franchises for another by constitutional amendment, court should not hold that people intended to postpone all collections of such taxes for entire year, unless intention to provide such tax hiatus was clearly expressed (Const. art. 13, § 16, subds. 2 (a), 5).

3. Constitutional law ⇐20

Legislative construction of constitutional provision which may be open to two constructions is controlling on courts.

4. Taxation ⇐54

Tax for one year may be based on income of next preceding year.

5. Taxation ⇐159

Water utility corporation which had no net income for 1931 and which went out of water business on March 3, 1930, but which retained business of "holding, conservation, administration, investment and reinvestment of non-operative assets of the corporation," held not to have discontinued "actual operations within the state," so as to be entitled to invoke statute placing annual tax of \$25 until dissolution on corporations which discontinue actual operations within state (St. 1929, p. 25, § 13, as amended by St. 1931, p. 65, § 3).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Spring Valley Company, Limited, against Charles G. Johnson, State Treasurer of the State of California. From a judgment for defendant after sustaining demurrer to plaintiff's complaint, plaintiff appeals.

Affirmed.

Theodore J. Savage, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment entered after sustaining a demurrer to plaintiff's complaint. The action was brought by appellant, Spring Valley Company,

Limited, against the state treasurer to recover taxes paid under protest for the year 1931.

From the complaint it appears that prior to March 3, 1930, appellant for many years was engaged in supplying water as a water utility corporation to the inhabitants of San Francisco, and on that date it transferred the whole of its water system to the city and county of San Francisco and retired from the water utility business, but that it retained and still owns certain lands not necessary or useful in such water utility business, but which it had been compelled to acquire from time to time in order to acquire certain other contiguous lands necessary and useful in such business; that from January 1, 1930, to March 3, 1930, appellant derived a net income from its water utility business of \$448,512.81, but since that time it has not derived and can no longer derive any income from the distribution of water; that since March 3, 1930, appellant's sole business has been the holding, conservation, administration, investment, and reinvestment of said non-operative assets, and that instead of a net income appellant suffered a net loss in 1931 of \$43,539.54; that despite these facts the franchise tax commissioner assessed a tax upon appellant for 1931 based upon appellant's net earnings in 1930, including the \$448,512.81 derived from its water business between January 1 and March 3, 1930, which tax appellant paid under protest and herein seeks to recover.

It is appellant's first contention that section 4 of the Bank and Corporation Franchise Tax Act of 1929 (Stats. 1929, pp. 19, 20) is unconstitutional in so far as it purports to authorize a tax upon a corporation "upon the basis of its net income for the next preceding fiscal or calendar year." This argument is pointed to subdivision 2(a), § 16, article 13 of the Constitution of the state, as adopted November 6, 1928, which reads: "All financial, mercantile, manufacturing and business corporations doing business within the limits of this State, subject to be taxed pursuant to subdivision (d) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the State for the privilege of exercising their corporate franchise within this State a tax according to or measured by their net income. The amount of such State tax shall be equivalent to four per cent. of their net income."

Appellant argues that this constitutional provision can bear but one construction, and that is that the net income by which the tax is to be measured must be the net income earned in the year for which the tax is collected, and that the legislative provision attempting to measure it by the net income of the preceding year is therefore not authorized by and in conflict with the constitutional provision under which it was adopted. To the support of this argument it brings first the rule that taxing statutes are to be strictly construed against the state (*In re Estate of Potter*, 188 Cal. 55, 204 P. 826); second, the definition of "net income" as gross income actually received less expenses, and not earnings not yet received and which may never be received (*Mutual Benefit Life Ins. Co. v. Herold* [D. C.] 198 F. 199; *Brown v. Long*, Commissioner, 242 Mass. 242, 136 N. E. 188; *People v. San Francisco Savings Union*, 72 Cal. 199, 13 P. 498), from which it is argued that net income must mean precisely the net income of the year for which the corporation is taxed; third, that it is inherently unjust to base a franchise tax for one year, when nothing may be earned, on the earnings of the previous year.

To all of these arguments a ready answer may be found in the provisions of the Constitution itself. Subdivision 5 of section 16, article 13 of the Constitution, adopted at the same time as subdivision 2(a) thereof, provides in part: "Said taxes shall become a lien on the first Monday in March of 1929 and of each year thereafter. The Legislature shall pass laws necessary to carry out this section. The acts of the forty-eighth session of the Legislature passed pursuant to this section shall be effective immediately upon their passage."

[1,2] Placing the construction contended for by appellant upon subdivision 2(a) of section 16 would necessarily postpone the levy of the tax for the year 1929 to some time in 1930, because the net income for 1929 could not be known or ascertained until the year was completed. Why then the provision for the tax to become a lien in March, 1929? And what the necessity for the provision putting into immediate effect the acts of the Forty-Eighth Session of the Legislature passed pursuant to the constitutional provisions? Taking section 16, article 13, as a whole, it seems clearly to contemplate a tax to be levied and collected in 1929, and this would only be possible if the net income of the previous year was used as its basis. This con-

struction is reinforced by the practical consideration that if the levy and collection of these taxes was to be postponed to 1930, the state would derive no revenue from this source during the entire year of 1929. In substituting one form of taxation upon corporate franchises for another, we should not hold that the people intended to postpone all collections of such taxes for an entire year, unless the intention to provide such a tax hiatus was clearly and unmistakably expressed.

[3,4] These conclusions are supported by the rule that the legislative construction of a constitutional provision which may be open to two constructions is controlling on the courts [*City and County of San Francisco v. Industrial Accident Commission*, 183 Cal. 273, 279, 191 P. 26; *Pacific Indemnity Co. v. Industrial Accident Commission*, 215 Cal. 461, 464, 11 P.(2d) 1, 82 A. L. R. 1170], a rule which is equally applicable to a taxing statute (*People v. Southern Pacific Co.*, 209 Cal. 578, 593, 594, 290 P. 25), and by the rule frequently announced by the Supreme Court of the United States that it is constitutionally proper to base a tax for one year on the income of the next preceding year (*People of State of New York v. Jersawit*, 263 U. S. 493, 44 S. Ct. 167, 68 L. Ed. 405; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 36 S. Ct. 236, 60 L. Ed. 493; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 163, 35 L. Ed. 994).

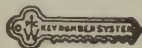
In 1931, section 13 of the Bank and Corporation Franchise Tax Act was amended to provide (Stats. 1931, p. 65): "If any bank or corporation discontinues actual operations within the state in any year and thereafter has no net income but does not dissolve or withdraw from the state, it shall in the succeeding year and thereafter until dissolution, withdrawal or resumption of operations, pay an annual tax to the state of twenty-five dollars."

[5] If appellant comes within the provisions of this section it would seem entitled to invoke them, although the amendment did not go into effect until February 27, 1931. *Fullerton Oil Co. v. Johnson* (Cal. Sup.) 39 P.(2d) 796. However, the provision is in the conjunctive. The corporation must discontinue operations in the state and have no net income for the year in order to come within its terms. Appellant had no net income for the year 1931, but according to the allegations of its complaint, while it went out of the water

business "since March 3rd, 1930, the sole business of this company has been the holding, conservation, administration, investment and reinvestment of said non-operative assets of the corporation." A corporation so engaged cannot be held to have discontinued actual operations within the state.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.



7 Cal.App.2d 466

**CARSWELL v. PACIFIC GREYHOUND
LINES, Inc., et al.**
Civ. 5213.

District Court of Appeal, Third District,
California.

June 8, 1935.

Hearing Denied by Supreme Court
Aug. 6, 1935.

1. Automobiles Ⓒ245(17, 62)

Whether driver of truck and his assistant failed to keep red taillight burning when truck was stalled on highway at night, and whether negligence in that respect was proximate cause of accident, *held* question for jury in action for injuries to passenger in stage which collided with truck's trailer (St. 1923, p. 551, § 106).

2. Appeal and error Ⓒ301

Litigant desiring to avail himself of right to appeal upon ground of excessive damages must make that ground a motion for new trial, otherwise the point is waived.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Edith Carswell against the Pacific Greyhound Lines, Incorporated, and others. Judgment for plaintiff, and defendants Blankenship Motors, Incorporated, William A. Hart, and David Mattos appeal.

Affirmed.

H. K. Landram, of Merced, for appellants.

F. M. Ostrander, of Merced, for respondents.

RANKIN, Justice pro tem., delivered the opinion of the court.

Appeal by defendant Blankenship Motors, Inc., William A. Hart, and David Mattos from a judgment against all of the defendants awarding damages in the sum of \$5,575.15 for injuries resulting to plaintiff from a motor vehicle collision, and from an order denying a new trial.

By their answer the defendants Pacific Greyhound Lines, Inc., and G. O. Christensen admit their negligence and allege negligence on the part of appellants.

Appellants make the point on this appeal that the judgment lacks evidentiary support for the reason that the record does not establish that any negligence of appellants proximately caused or concurred in the accident, and that no evidence of negligence on the part of appellants having been shown, the jury was misdirected in the instructions of the court.

[1] Plaintiff was a passenger in an automobile stage of the Pacific Greyhound Lines, Inc., owned by said corporation and driven by defendant G. O. Christensen. Near Atwater, in the county of Merced, the automobile stage crashed into a trailer attached to a truck owned by appellant Blankenship Motors, Inc., and in charge of two drivers, the appellants William A. Hart and David Mattos. Both the automobile truck and the stage were traveling south on the highway. The truck and trailer stalled while the appellant Hart was driving the same and appellant Mattos was asleep on the truck, in a place provided for that purpose. The driver started to pull off the highway and succeeded in getting all of the equipment off of the highway except the left rear wheel of the trailer, which remained upon the highway. The time was about 4 o'clock a. m. on the 14th of September, and it seems to be conceded that it was dark at that time. While the trailer was thus on the highway, the automobile stage approached the same, at a speed of approximately forty-five miles per hour. The driver of the stage testified that he was momentarily blinded by the headlights of a passing automobile and that he did not see anything on the highway until he crashed into appellants' trailer. Appellants base their assignment on this appeal on the assumption that the record shows without dispute that a red taillight and two blue side lights were burning on the rear of the trailer at the time of the accident and contend that there was a red taillight showing upon the rear of the

trailer at the time of the collision, and therefore appellants having complied with the provisions of the California Vehicle Act (St. 1923, p. 517, as amended) with reference to the burning of lights, there is no evidence of any negligence upon their part which proximately contributed to the accident. They cite the case of *James v. White Truck & Transfer Company* (Cal. App.) 36 P.(2d) 401, and quote from that case the language of the court relating to the legal effect of the existence of a red light as a warning of danger during the hours of darkness. The case is instructive upon that point but has no application here upon the question to be decided as in that case there seemed to be no question of the existence of the red light. Appellant Matos testified that he operated the truck and trailer on the trip south as far as Modesto, which place he reached about 2 o'clock in the morning when, upon checking the same, they found that the lights were all burning. However, it does not appear that either of the drivers of the truck checked the red light after leaving Modesto.

Mrs. Marie Hopson, a witness, testified that at the time she was a passenger on the stage and was sitting in the front seat next to the driver. As they approached the scene of the accident she observed the presence of a truck and trailer upon the highway and observed two little blue lights burning upon the trailer when the stage was about 150 feet away from it and that she saw no other kind of lights upon the truck. On cross-examination she stated that she did not notice any red tail light on the truck.

G. O. Christensen, the driver of the stage, testified that he did not see the truck at all, but there was a car approaching and the lights on the approaching car affected his vision; he was blinded momentarily and was going about forty-five miles per hour. It is clear, therefore, that there is a conflict in the evidence as to whether at the time of the accident there was any red light burning upon the trailer. There is no direct evidence that such a light existed at that time, while there is evidence of a negative character from which a jury might find that there was no red taillight on the trailer at the time of the collision and that the negligence implied by the failure to keep the red taillight burning was a proximate cause of the accident. That question was properly submitted to the jury, and from this conclusion it follows

that the court properly instructed the jury as to the provisions of section 106 of the California Vehicle Act (St. 1923, p. 551), with reference to red taillights upon motor vehicles upon the highway. We therefore find no merit in this appeal upon the points raised by appellants.

[2] Appellants make a further contention that the damage award was excessive as a matter of law. The record in the case includes the motion for new trial from which it appears that no question as to the award being excessive was raised upon the motion for a new trial.

It is well settled that a litigant desiring to avail himself of the right to appeal upon the ground of excessive damages must first make such ground a motion for a new trial in order that the trial court may review the matter. In other words, the remedy lies first in a motion for new trial addressed to the trial court, and if it is not brought to the attention of the trial court on a motion for new trial it is too late to raise the point for the first time on appeal. *Williams v. A. R. G. Bus Co.*, 47 Cal. App. 568, 190 P. 1036; *Beatty v. Warren*, 130 Cal. App. 573, 20 P.(2d) 355. We find no merit in the appeal.

It is therefore ordered that the judgment be, and the same is hereby, affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.



7 Cal.App.2d 412

BARRY v. BOARD OF DIRECTORS OF IMPERIAL IRR. DIST. et al.

Civ. 1722.

District Court of Appeal, Fourth District,
California.

June 6, 1935.

Hearing Denied by Supreme Court
Aug. 5, 1935.

I. Statutes ☞61

Court must presume that Legislature, before enacting statute classifying irrigation districts with respect to method of elections, took evidence as to pertinent differences between smaller and larger districts, as respects question whether statute is invalid as local and special law or as one not having uniform operation (Const. arts. 1, 4, §§ 11, 25).

2. Waters and water courses ⇨224

Legislature has broad powers and may exercise wide discretion in providing for and controlling manner in which affairs of irrigation districts shall be carried on (Const. art. 11, § 13).

3. Statutes ⇨47

Statute so vague and uncertain that person of ordinary intelligence cannot understand its meaning is invalid.

4. Statutes ⇨47, 48

Statute providing that, in irrigation districts of more than 500,000 acres, voter, to be qualified at district election, must have appeared on last assessment roll as holder of title or evidence of title to real property within district, and that secretary shall prepare certified roster of persons possessing requisite qualifications, *held* invalid because of vagueness and inconsistency rendering reasonable or sensible construction impossible, in view of fact that assessment roll does not distinguish between owners and possessors of realty (St. 1933, p. 2028, §§ 4a, 4b).

5. Waters and water courses ⇨227

Statute requiring names of voters at irrigation district elections in districts of over 500,000 acres to have appeared on last preceding assessment roll as holders of title or evidence of title to realty *held* not to authorize secretary of district to determine arbitrarily that certain deeds were void or, in preparing roster of voters, to mark names of particular grantees with asterisks and certify that only persons whose names were not so marked were qualified to vote (St. 1933, p. 2028, §§ 4a, 4b).

6. Waters and water courses ⇨227

Stamping of certain ballots in irrigation district election with the words "cast by special permission" *held* unauthorized and illegal (Pol. Code, § 1197, subd. 7; St. 1897, p. 261, § 23).

7. Waters and water courses ⇨227

Procedure in irrigation district election, whereby certain grantees who in directors' opinion were fraudulent grantees were given ballots marked "cast by special permission," and such ballots, after closing of polls, were segregated and not considered in determining result of election, *held* illegal; proper remedy for preventing unqualified persons from voting being action in advance to purge the rolls or by challenge (Pol. Code, § 1197, subd. 7; St. 1897, p. 261, § 23; St. 1933, p. 2028, §§ 4a, 4b).

8. Mandamus ⇨16(1)

Where irrigation district election was void because of invalidity of statute under which it was held and because of violation

of election laws, mandate should not be granted to compel counting of ballots illegally segregated, since to do so would, under circumstances, be an idle act.

9. Mandamus ⇨182

Generally, peremptory writ of mandate follows terms of alternative writ and should be denied when complete relief asked for cannot be given, though such rule may be departed from in proper case.

10. Mandamus ⇨176

Where irrigation district election was void because of invalidity of statute and violation of election laws, and mandate therefore was not available to compel counting of illegally segregated ballots, fact that petitioner also asked that board of directors be directed to cancel certificate of election issued to certain person who was not party to mandate proceeding *held* not to warrant granting of writ for such purpose, especially since cancellation of the certificate would not aid petitioner.

Proceeding on petition for a writ of mandate by Vinnie Barry against the Board of Directors of the Imperial Irrigation District and others.

Petition denied.

Hugh S. MacKinnon, of Calexico, for petitioner.

Charles L. Childers, of Los Angeles, for respondent Mark Rose.

D. B. Roberts, of El Centro, for respondent Ira Aten.

Harry W. Horton and George R. Kirk, both of El Centro, for other respondents.

BARNARD, Presiding Justice.

This is an application for a writ of mandate compelling the respondents, as the board of directors of the Imperial irrigation district, to meet and count all of the votes cast at an election held in said district on February 6, 1935.

This district was organized under the California Irrigation District Act, approved March 31, 1897, p. 254, as amended (Deering's Gen. Laws, Act 3854). In 1915 an act was passed giving certain enlarged powers to the board of directors of irrigation districts having an area of more than 500,000 acres. St. 1915, p. 1. In 1933 the latter act was amended (St. 1933, p. 2028) by adding thereto two sections, which read as follows:

"Sec. 4a. In such districts, no person shall be entitled to vote at any election unless such person possesses all of the qualifications required of electors within the county election precincts in such districts under the general election laws of the State, and shall have appeared on the last preceding equalized assessment roll of the district as the holder of title or evidence of title to real property situate within the district in which the election is being held. Any holder of land under a possessory right acquired by entry or purchase from the United States or the State of California, or by a contract of purchase shall be deemed to be a holder of evidence of title to said land within the meaning of this act.

"Sec. 4b. Prior to any election in any such district, the secretary of the district shall prepare a roster of all persons possessing the qualifications prescribed in the preceding section for each precinct or consolidated precinct within such district by reference to the last preceding equalized assessment roll of the district and the registers of voters in the county or counties in which such district may be situate, and prior to the election he shall certify to each of the election boards in the district the roster of persons qualified to vote in their respective precincts or consolidated precincts. Only persons whose names appear on such rosters shall be entitled to vote at the election for which such rosters were prepared."

The Imperial irrigation district has an area of more than 500,000 acres, and in the election here in question, the first to be held after the adoption of the amendment last referred to, an attempt was made to apply the property qualification provisions of that amendment to the voters of said district. It is conceded by all parties hereto that the Legislature may legally provide for a property qualification for electors voting at irrigation district elections, if the same applies to all districts organized under the general act, but questions are here raised with respect to the interpretation, the validity, and the effect of this particular amendment of 1933.

Among other things, the petition alleges that the petitioner's term of office as assessor collector of said district expires in March, 1935; that she was a candidate for re-election; that one Charles Bratton was also a candidate for the same office; that the secretary of said district prepared a

roster of all persons possessing the qualifications required of electors under the general election laws of the state and who appeared on the last preceding equalized assessment roll of said district as the holder of title or evidence of title to real property situated within said district for each precinct within the district by reference to the last preceding equalized assessment roll of the district and the registers of voters in Imperial county; that the secretary certified to each of the election boards in said district the roster of persons qualified to vote in such precinct; that the several rosters so prepared contained, in the aggregate, the names of 5,670 electors; that, on the day of the election referred to, 3,082 electors whose names were on these rosters appeared at the polls in the various precincts, were given ballots, voted the same in the usual manner, and all of said ballots were thereupon placed in ballot boxes provided for that purpose; that 423 of the persons thus voting were given ballots on each of which an election officer, before delivering the same to the voter, had stamped the words "Cast by Special Permission" with a rubber stamp; that the names of each of the persons who were given a ballot thus marked or stamped appeared in the roster prepared and certified by the secretary of the district and each of said persons possessed all of the qualifications of a voter under the general election laws, and each appeared on the last preceding equalized assessment roll of said district as the holder of title or evidence of title to real property within said district; that none of said 423 electors were challenged; that all of the ballots cast by them and thus marked were placed in the ballot boxes and mixed with other ballots cast at said election; that, after the polls closed in each precinct, all of the ballots which were stamped or marked as aforesaid were separated and placed in a separate envelope marked on the outside "Ballots voted by Special Permission"; that only the ballots which were not marked with the stamp "Cast by Special Permission" were counted and noted or recorded on the tally sheets; that, thereafter the usual certificates were signed by the election officers showing the number of votes cast for each candidate, but referring to and including only the votes in each precinct which were on ballots not marked "Cast by Special Permission"; that on February 11, 1935, the board of directors of the district met to canvass the returns of the

election; that the petitioner appeared and demanded a recount of the vote in each precinct; that thereupon the board proceeded to and did recount only the ballots cast at said election which were not stamped "Cast by Special Permission," and declared the results of the election as shown by said count; that this count then showed that 1,304 votes had been cast for the petitioner and 1,317 votes for the said Charles Bratton for the office here in question; that the board then declared said Charles Bratton elected to said office, and a certificate of election was issued to him; that at said recount the board of directors refused to count the 423 ballots which had been marked "Cast by Special Permission" or any of them, and refused to check the signatures of the electors on the voters' roster with the rosters prepared by the secretary; that, of the 423 marked ballots which were not counted, 287 votes were cast for the petitioner and 128 votes were cast for the said Bratton; that, if said marked ballots are counted, there will be a total of 1,591 votes for the petitioner and 1,445 votes for Bratton; and that the petitioner, at the time of the recount by the board, demanded that said marked ballots be counted, but the board refused to count the same. The prayer is for an order directing the respondents to meet and count all of the votes cast at said election, including those referred to which were specially stamped or marked, to declare elected the person then shown to have received the highest number of votes cast for said office, and to cancel the certificate of election heretofore issued to Charles Bratton.

The answer filed by the majority of the respondent board of directors alleges that only 2,659 persons who had been certified by the secretary as properly qualified voters appeared and voted at said election; that, in addition thereto, 423 persons appeared at the polls who had not been certified as qualified voters and whose names did not appear on the roster certified by the secretary as being persons qualified to vote; that each of these 423 persons was in truth and in fact not the owner of, or the holder of title or evidence of title to, any real property within this district; that each of said 423 persons was given a ballot and permitted to designate thereon his choice of the respective candidates, but that none of said 423 ballots was in any way counted or tallied or reflected in the certificates or returns made by the election

officers; that, if these 423 ballots were to be counted, it might change the result of the election in favor of the petitioner as against the candidate declared elected by the election boards and by the board of directors of the district; that a recount was had before the board of directors of the district, at which the petitioner demanded that these 423 marked ballots be counted; that the board of directors refused to count the same; that at said recount the board received evidence as to the identity of the persons who had cast the 423 specially marked ballots, and as to their qualifications to vote at said election, and decided and determined that said 423 persons were not entitled to vote at said election, for the reason that none of them owned any real property within the district, and refused to count said ballots because the persons casting the same had not been certified by the secretary of the district as qualified to vote, and because in truth and in fact none of them owned any real property within the district.

As an affirmative defense, the majority of the directors alleged that the 1933 amendment above referred to was passed at the request of this district and its directors; that immediately thereafter the respondent Mark Rose, together with four other individuals, conspired to circumvent and defeat the property qualification provisions therein contained; that in carrying out this conspiracy these parties executed and caused to be recorded six purported deeds each conveying a small parcel of practically worthless land to a large number of persons named as grantees therein who did not otherwise own any land within the district; that this was done with the sole intent and purpose of conveying a paper or record title to an infinitesimal parcel of land to each of said purported grantees for the purpose of giving to each of said purported grantees a purported property qualification, for the sole intent and purpose of fraudulently attempting to circumvent and defeat the intent and purpose of the property qualification provided in the amendment; that one of these deeds quitclaimed one acre to 318 grantees, another quitclaimed a vacant lot in Imperial to 421 grantees, another quitclaimed a lot in Holtville to 577 grantees, another conveyed an undivided one-half interest in ten acres to 431 grantees, another quitclaimed an undivided one-half interest in ten acres to 1,156 grantees, while another quitclaimed ten acres to 609

grantees; that most or all of these small parcels were worthless pieces of land which had been sold for taxes; that no consideration passed as to any of these deeds, and most of the grantees named had no knowledge that they were so named therein; that in any case where the grantee had consented thereto such consent had been fraudulently given as a part of said conspiracy; that this petitioner was persuaded to join in said conspiracy and to place the names of the purported grantees in these deeds upon the assessment rolls of said district; that in so placing the said grantees on the assessment rolls of the district the petitioner did not purport to assess a separate interest to each of said grantees, but purported to assess the property described in each of said deeds to all of the grantees named therein; that these answering majority members of the board and the secretary of the district knew that the so-called conspirators would attempt to have the grantees in these deeds present themselves at the polls and demand the right to vote, regardless of their actual qualifications; that, solely for the purpose of keeping a record of the proposed efforts of any of said persons to vote at said election, each of said persons who appeared and requested to be allowed to vote was permitted to sign his name and give his address on a book designated as "Roster of Voters"; that a separate poll list was kept of persons actually receiving a ballot of any kind and actually marking and delivering the same to the election board; that each of the persons named as a grantee in any of said deeds who presented himself and desired to vote was permitted to sign the so-called roster of voters and was given a ballot which had stamped at the head thereof "Cast by Special Permission"; that said persons were then permitted to mark such ballots for such candidates as they saw fit, after which such ballots were received by the election board and deposited in the ballot box with all of the other ballots; that, when the polls closed, the election officers segregated the ballots into two piles, one containing those stamped "Cast by Special Permission" and the other those not so stamped; that said two classes of ballots were separately tallied on separate tally sheets and sealed in separate envelopes prepared for the purpose; and that, when the official returns were made, only those votes were counted and returned which were cast by persons who had been cer-

tified by the secretary as qualified to vote and without counting or taking into consideration the 423 ballots which had been specially marked.

The respondent Rose filed a separate answer setting up various claimed irregularities in the holding of the election; that the 1933 amendment is unconstitutional in various respects; that the secretary of the board did not carry out the provisions of that amendment; that in preparing the roster of voters provided for in section 4b of that amendment the secretary placed a star or asterisk before the names of those persons who appeared as grantees in the deeds referred to, which deeds the secretary considered to be void; that in his certificate to said rosters the secretary certified that only those persons named therein were qualified to vote where no asterisk appeared before the name on the roster; that the certificates on the various rosters were not signed by the secretary; and that many of the ballots stamped "Cast by Special Permission" were voted by persons who had not been informed that the ballots were so stamped and who believed the ballots were in the usual regular form used by other voters.

Demurrers were filed to the petition and to the answers, and, while certain matters of fact have neither been admitted nor proved, as, for instance, the fact that the various deeds to the large numbers of grantees were given for a fraudulent purpose and are void, enough of the actual situation appears from the admitted facts for the purpose of this decision. It fully appears that, in preparing the roster provided for in section 4b, the secretary did not take and certify all names appearing on the assessment rolls of the district and also appearing on the registers of voters in that county; that he included in this roster the names of many, if not all, of the persons named as grantees in the deeds above referred to; that he placed a star or asterisk opposite the names of such of these grantees as were included in the roster; that in his certificate he certified that only those before whose names no asterisk appeared were entitled to vote; that he certified to nothing with respect to those persons before whose names an asterisk appeared; that, while it is admitted in the answers that the names of the persons thus marked with an asterisk on these rosters actually appeared on the assessment rolls of the district, the secretary did

not certify such persons as qualified voters, and it does not appear whether or not these persons were registered as voters; that the roster furnished to the election officers contained both names marked with an asterisk and not certified as qualified voters and other names not so marked but which were certified as voters; that, when a person whose name was marked with an asterisk on the roster appeared at the election, he was given a ballot which had been specially marked by the election board by impressing thereon with a rubber stamp the words "Cast by Special Permission"; that other persons were given ballots not so marked; that both classes of persons were allowed to go through the form of voting and all of the ballots were placed in the same boxes; and that in counting and returning the results of the election the ballots cast by those persons whose names had been marked with an asterisk on the roster and who had been given ballots stamped in this special manner were not counted or considered.

The petitioner contends that, under the provisions of sections 4a and 4b, the secretary is directed to make up the roster of voters by a reference to the assessment rolls and to the registers of voters and to nothing else; that the duty of the secretary in this regard is purely ministerial; that he must certify the entire roster thus prepared and not merely a portion of the names thereon; that this simple interpretation of sections 4a and 4b overcomes any objections to the validity of these sections, constitutional or otherwise, and makes immaterial any irregularities in the election procedure; that it must be presumed that the secretary complied with this law, and any failure in this respect is an immaterial error with no resulting injury; that there was a substantial compliance with the act when the secretary prepared the list of names; that the act does not provide for placing an asterisk in front of any of the names on the list, and such marks here must be disregarded; that, while there were certain irregularities in this election, these consisted of violations of directory, as distinguished from mandatory, provisions of the law; that, while the marking of certain of these ballots by the election board was unauthorized by law, the same was a minor and unsubstantial variation from the law, and must be disregarded; that, since the 423 ballots in question were cast by persons who were

actually entitled to vote, any irregularity in the holding of the election is immaterial; and that nothing remains to be done except to count the especially marked ballots which the election boards and the board of directors refused to consider.

The respondent majority of the board contend that the persons who cast the 423 ballots in question were not certified by the secretary as qualified to vote; that in fact they were not owners of property in the district and were not so qualified; that their names were included on the assessment rolls of the district as the result of a conspiracy and by reason of fraudulent deeds to worthless lands; that it was not possible to challenge such voters because the situation was not within the grounds of challenge provided in section 1230 of the Political Code; that it was not possible to purge the lists of these names, since it was impracticable to serve all of the grantees in these deeds; that it was therefore decided to keep track, not of individual ballots, but of the ballots cast by a certain class, namely, the grantees in these purported deeds; that the only provision in the general election laws against marking a ballot is that a ballot must not be marked by a voter in such a manner that it can be identified; that under the general election laws the marking of ballots by the election board with a stamp is not unlawful; that marking the ballots in this manner would and did enable the two classes of voters to be segregated; that it was known that any refusal to permit the grantees in these deeds to vote would be attacked as illegal; that it was therefore decided to permit them to cast a special ballot and leave their right to vote and the counting of such votes to the proper tribunal if a hearing should be asked; that the secretary prepared a roster of the names found on the assessment rolls and also on the register of voters, but placed a star opposite the names of the grantees in these particular deeds, and thus enabled the election officers to identify them and to give them a specially marked ballot; that the secretary did not certify the grantees in these deeds as having the proper qualification and in the certificates distinguished between them and others who had an unquestionable right to vote; that the election boards had been provided with ballots in the proper form as required by law, all duly numbered; that these ballots had been provided with a space at the top where they could be stamped "Cast by Special

Permission" with a rubber stamp; that the election boards had the lists of names with certain names marked with an asterisk so that they could tell which persons should be given a specially marked ballot; that the election boards were instructed to give such specially marked ballot to all persons whose names on the lists were marked with an asterisk; that, after the polls closed, both classes of votes were counted, but, under instructions given to the election boards, the results were declared from a count of the unstamped ballots only; that, while there is no definite statutory authority for this procedure, it violates no mandatory or directory provision of any election law; and that this procedure preserved the record, so that any one casting such a marked ballot and who claimed a right to vote could later establish such right in a proper proceeding. It is then argued that there is no provision of law permitting a contest in an election in an irrigation district; that the only recourse in such a case is by demanding a recount by the board of directors of the district; that such a recount was demanded and had; that the action of the board upon this recount is final and conclusive and cannot be reviewed in the courts; and that therefore no writ can issue herein.

The respondent Rose contends that this entire election is void because sections 4a and 4b are unconstitutional in that they are local and special laws where general laws can be made applicable; that they do not have a uniform operation; that they grant special privileges or immunities to an arbitrary class of persons selected from a larger body of persons standing in the same relationship to the subject-matter; that they unlawfully delegate legislative and judicial powers; and further that these sections are void because they cannot be construed in such a manner as to make it possible to comply with the terms thereof.

[1,2] With reference to the contention that these sections violate article 4, § 25, of the Constitution, in that they constitute local and special laws where general laws can be made applicable, and that they violate article 1, § 11, of the Constitution, in that they do not have a uniform operation, it may be observed that there is some support for the view that these amendments are not unconstitutional for these reasons, and that it is within the power of the Legislature to provide for a property qualification for voters in elections in irrigation

districts of this size. Larger districts may have a larger population, bringing about different and greater problems, a fact which is recognized by permitting cities to be classified according to their population for many purposes. There may be a considerable difference between larger districts which are more apt to contain large bodies of land which are farmed by tenant farmers or employees and in which there are a number of towns and cities, some of them of considerable size, and smaller districts with fewer nonresident owners and composed entirely or largely of small farms operated by their owners. We must presume that the Legislature took evidence as to such matters and others that might be mentioned, and we could not arbitrarily hold that there was no natural or reasonable ground for such a distinction, in the absence of a more complete showing as to the facts than we have here. In *Wores v. Imperial Irrigation Dist.*, 193 Cal. 609, 227 P. 181, in considering the act of 1915, prior to these amendments of 1933, it was held that there was a proper ground for the classification in so far as the act then stood. As then considered, the act related to giving an increased power to the board of directors in districts containing more than 500,000 acres, particularly with respect to making assessments. Many facts are set forth in the opinion in that case as justifying the classification there made for the purposes then under consideration. It might well be argued that grounds sufficient to justify such a classification for the purpose of giving an increased power to levy assessments would also justify applying a different method of electing the men who are to exercise this enlarged power. The Legislature has broad powers and may exercise a wide discretion in providing for and controlling the manner in which the affairs of an irrigation district shall be carried on. Const. art. 11, § 13; In *re Madera Irr. Dist.*, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. However, in view of other considerations, it is not necessary to decide the question thus raised.

The objection that these amendments provide for an unlawful delegation of legislative and judicial power and discretion might apply under some interpretations thereof. If they are to be construed, as they were by the board of directors in this district in this election, as permitting or authorizing the secretary of the district to

decide and determine, not only which of the names on the assessment roll appeared there as the holders of title or evidence of title to land in the district, but also that an evidence of title so held was in fact void and worthless, and this without notice or hearing of any kind and without any opportunity to such holder of title to appear and defend the same, it must be held that the act confers judicial powers on a subordinate appointive officer of the district and that the same is unconstitutional. On the other hand, if these amendments mean that the secretary is merely authorized to make up the rosters for the election by placing thereon the names of persons whose names appear both on the assessment roll of the district and on the register of voters, the amendments would not be subject to this objection.

[3,4] What, then, is the proper interpretation of these sections or can their real meaning be understood and determined? This brings us to what we consider the most important objection to them, namely, that they are so vague and indefinite that it is impossible to tell what they mean or to give to them a reasonable and sensible interpretation. As was said in *Re Leach*, 215 Cal. 536, 12 P.(2d) 3, 6: "It is not necessary to cite authorities in support of the proposition that when a statute is so vague and uncertain that a person of ordinary intelligence cannot understand its meaning, it may not be upheld as a valid statute. * * *" See, also, *In re Peppers*, 189 Cal. 682, 209 P. 896; *In re Schmolke*, 199 Cal. 42, 248 P. 244, and *County of Tulare v. City of Dinuba*, 188 Cal. 664, 206 P. 983. It is first apparent that the act here in question cannot be literally complied with. It provides that no person shall be entitled to vote at such an election unless he shall have appeared on the last assessment roll of the district as the holder of title or evidence of title to real property within the district. Section 35 of the Irrigation District Act (St. 1897, p. 266, as amended by St. 1931, p. 233) governs the preparation of these assessment rolls and provides that the assessor must assess all land in the district to the persons who own, claim, or have possession or control thereof. That section then provides what must appear on the assessment roll or assessment book, including the name of the person to whom the property is assessed, with a provision that, if the name is not known to the as-

essor, the property shall be assessed to "unknown owners." The assessment may have been made to the person claiming or having possession or control of a particular property, or even to an unknown owner, and it is nowhere provided that the assessment rolls shall show which names thereon are there as the holders of title or evidence of title to real property within the district. We think the amendments are vague and uncertain, in that it cannot be told therefrom who is to be allowed to vote, whether all of those who, in addition to being on the register of voters, also appear on the assessment rolls, or only such part of these persons as affirmatively appear on the face of the assessment rolls to be there as holders of title, or such part plus any others who may appear from an outside investigation to have been placed upon the assessment rolls, because they were holders of title. If the purpose was to permit some one to decide who is the holder of title, this involves either an unusual discretion on the part of the assessor in making up the assessment roll or upon the part of the secretary in making up the roster of voters. In either case, an attempt to comply therewith would involve, not only the use of discretion, but even of judicial power which could not be delegated to such an officer. It would open the door to great possibilities of fraud and discrimination in permitting either of such officers to exercise such a power of passing upon the validity and effect of various instruments affecting the title to land, but, more important, so far as the present consideration is concerned, the provisions of the act are so vague, indefinite, and uncertain that it cannot be determined what shall be done or how it shall be done. After the assessor has prepared the assessment rolls in accordance with the other provisions of the Irrigation Act, it cannot be told from the provisions of this amendment what the secretary is to do in preparing the roster of voters, whether he is merely to take the names from the assessment roll or to supplement that as the result of his own outside investigations, or, if so, how this shall be done. If the secretary is to go outside of the assessment roll, no rules whatever are laid down for his guidance.

The act is also inconsistent in its express provisions. Section 4a, as one qualification for a voter, provides that he shall have appeared on the last assessment roll as the holder of title or evidence of title

to real property in the district. Not only would this naturally involve and require an outside investigation as to whether those named on the roll appeared there as the holders of title or evidence of title, since that fact would not appear on the face of the assessment roll, but that section goes on to specifically provide that persons claiming under entry or purchase from the federal or state governments, or by contract of purchase from others, shall be deemed holders of title within the meaning of the act. This plainly indicates an intention that an investigation is to be made into the actual facts and that the status of those appearing on the assessment rolls is to be investigated to the extent and to the end of determining whether they are, in fact, holders of title or evidences of title; it being even provided that certain forms of claim to property shall be deemed to be evidence of title. On the other hand, section 4b provides that the secretary of the district shall prepare a roster of all persons possessing the qualifications prescribed in section 4a, and that he shall do this "by reference to the last preceding equalized assessment roll of the district and the registers of voters in the county." No one can literally comply with both of these sections, and an attempt to comply with either, in disregard of the other, or to apply the workable portions of both, not only leads to difficulties obviously not intended by the Legislature, but results in something entirely different from that which is authorized by either section. We think these two sections, constituting the amendment of 1933 to the act of 1915, are so vague, uncertain, and inconsistent that their meaning cannot be understood and that it is impossible to give them a reasonable or sensible construction.

[5] It further appears that in this particular case neither this amendment of 1933 nor the other election laws were complied with. Whatever this amendment means, and if it can be interpreted as having a reasonable meaning, it cannot possibly be held that, under its provisions, the secretary of an irrigation district had the power, after determining that certain persons appeared on the assessment roll of the district and also on the register of voters of the county, to arbitrarily determine and decide that the deeds under which these persons claimed were void and in fact conveyed no title and that said persons had no right to vote for that reason. In any event, and whatever be the

meaning of this amendment, the secretary did not comply with the same in making this roster of voters. He prepared a list containing the names of persons named as grantees in these deeds and a large number of other names. He marked the names of these particular grantees with a star or asterisk and attached his certificate that the persons whose names were so marked were not qualified to vote, and that the other persons named were qualified. If these other persons were not qualified to vote, their names should not have been included in such a list. And we have no way of knowing whether or not the 423 voters whose votes we are asked to order counted were otherwise qualified or not. They were not certified as voters, and it does not appear whether or not their names were on the registers of voters in that county.

[6,7] Section 23 of the Irrigation District Act (St. 1897, p. 261) provides that elections in irrigation districts shall be conducted as nearly as practicable in accordance with the general election laws of the state. This provision was not followed in the election here in question. Under instructions given to them by the board of directors of this district, the election officers permitted these 423 persons, although they had not been certified by the secretary as qualified to vote, to receive and cast ballots. They gave these persons specially marked ballots, and then, after the polls were closed, segregated these ballots and refused to count or consider the ballots so specially marked. The respondent board argues that the only provision in the general election laws which forbids any special mark on the ballot is the provision which forbids a voter from so marking his ballot as to enable him later to identify it. But section 1197 of the Political Code provides that but one form of ballot shall be used at an election. Subdivision 7 of that section provides that all of the ballots shall be precisely of the same size, arrangement, quality, and tint of paper, kind of type, and printed with the same kind of ink so that without the numbers on the stubs it shall be impossible to distinguish one of the ballots from the others. The stamping of these ballots with a rubber stamp reading "Cast by Special Permission" was a direct violation of this section of the Code, and was both unauthorized and illegal. Such a system of marking and discarding certain ballots violates the spirit of any and all election

laws, and, if permitted and approved, would open the door to all manner of fraud. Whether or not this violation of law, standing alone, would constitute a sufficient ground to set aside an election, it here furnishes an additional reason for so doing.

If these deeds with the many grantees named therein were, in fact, fraudulent, and if such grantees were not authorized to vote, those facts should have been determined in advance in an action to purge the rolls or by challenge or in some other proper procedure and not by going through the pretense of allowing these persons to vote, marking their ballots, and refusing to count the same. We are not impressed by the argument of the respondent majority of the board that, because they believed the six deeds were recorded to carry out a fraudulent conspiracy to avoid the effect of the amendment in question, the course adopted by them was the only one open to them after the Supreme Court decided that election rolls could not be purged without personal service on the persons involved [see *Pierce v. Superior Court*, 1 Cal. (2d) 759, 37 P.(2d) 453, 460], since the number of these grantees was so great as to make personal service on them impracticable. The deeds were recorded nearly a year before the election was held, and any difficulty involved or even the existence of a fraudulent conspiracy, if such be a fact, would not justify further illegal acts on the other side. Regardless of the situation as it appeared to these members of the board, and regardless of their good intentions in the matter, the fact remains that the procedure adopted only made the matter worse and added new difficulties to an already perplexing problem.

[8-10] Because we think this amendment of 1933 is void as so vague, uncertain, and inconsistent that its meaning cannot be determined, and because neither this amendment nor the other laws relating to elections were complied with, we are compelled to hold that the purported election of February 6, 1935, is void. It would be an idle act to order the questioned votes counted, under these circumstances. Page v. Board of Supervisors, 85 Cal. 50, 24 P. 607; *Wilson v. Blake*, 169 Cal. 449, 147 P. 129, Ann. Cas. 1916D, 205.

As a part of the relief demanded, the petitioner asked that the respondent board be directed to cancel the certificate of election issued to Charles Bratton, and this

was included in the alternative writ. Under the general rule, a peremptory writ follows the terms of the alternative writ, and should be denied when the complete relief asked for cannot be given. *Gay v. Torrance*, 145 Cal. 144, 78 P. 540. While this rule may be departed from in a proper case (*Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670) the circumstances do not warrant such an exception here. To order this certificate canceled would do the petitioner no good, the holder of the same is not a party to this proceeding, and it seems best to deny the application for a writ in its entirety.

The petition for a writ of mandate is denied.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 754

F. H. McIVER, Petitioner, v. BOARD OF DIRECTORS OF THE IMPERIAL IRRIGATION DISTRICT, Evan T. Hewes, William E. Young, Albert J. Kalin, Mark Rose, and Ira Aten, Constituting the Directors of the Imperial Irrigation District, Evan T. Hewes, William E. Young, Albert J. Kalin, Mark Rose, and Ira Aten, Individually, Respondents.

Civ. 1723.

District Court of Appeal, Fourth District, California.

June 6, 1935.

**Hearing Denied by Supreme Court
Aug. 5, 1935.**

Hugh S. MacKinnon, of Calexico, for petitioner.

Charles L. Childers, of Los Angeles, for respondent Mark Rose.

D. B. Roberts, of El Centro, for respondent Ira Aten.

Harry W. Horton and George R. Kirk, both of El Centro, for other respondents.

BARNARD, Presiding Justice.

This is an application for a writ of mandate compelling the respondents, as the board of directors of the Imperial irrigation district, to meet and count all of the votes cast at an election held in said district on February 6, 1935.

The petitioner herein was a candidate for treasurer of said irrigation district at the election referred to. An opposing candidate for that office was declared elected and this proceeding followed. With the exception of the names of the candidates and the office in question, the material facts herein are identical with those in the case of *Barry v. Board of Directors of the Imperial Irrigation District* (Cal. App.) 46 P.(2d) 298, this day decided.

Upon the authority of that case, and for the reasons therein given, the petition for a writ of mandate is denied.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 371

**MARULESCU et al. v. CITY PLANNING
COMMISSION OF CITY AND COUNTY
OF SAN FRANCISCO et al.**
Civ. 9504.

District Court of Appeal, First District,
Division 1, California.
June 4, 1935.

Rehearing Denied July 3, 1935.

Hearing Denied by Supreme Court
Aug. 2, 1935.

1. Municipal corporations Ⓒ120

Ordinance within authority expressly conferred on municipal corporation has same force within its corporate limits as statute passed by Legislature has throughout state.

2. Municipal corporations Ⓒ58, 111(2)

Charter of municipality is its constitution, and city ordinance must harmonize with charter.

3. Municipal corporations Ⓒ627

Board of supervisors, in establishing procedure under zoning regulations, cannot deprive property owners of rights given by charter.

4. Municipal corporations Ⓒ58

Word used in statute which was given uniform meaning by courts' decisions and was thereafter adopted in charter was presumed to have been used in charter in sense placed thereon by courts' decisions.

5. Municipal corporations Ⓒ601

Ordinance requiring petition for rezoning to be signed and verified by owner of

property held ineffectual to limit class of persons entitled to apply for rezoning under charter requiring hearing on change in classification on application of "interested property owner."

6. Municipal corporations Ⓒ601

Owners of adjacent property held "interested property owners" within charter provision authorizing hearing on rezoning on application of interested property owner, where it was sought to have property rezoned from commercial to residential classification.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding by Michael Marculescu and another against the City Planning Commission of the City and County of San Francisco and others for writ of prohibition. From a judgment granting the writ, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

H. O. Mundhenk, of San Francisco, for respondents.

GRAY, Justice pro tem.

Respondents' property in the city and county of San Francisco was, upon their application, rezoned by the city planning commission from a residential to a commercial classification. The board of supervisors, upon an appeal of other property owners, sustained such reclassification. Adjacent property owners then filed with the commission a petition requesting that respondents' property be rezoned to a residential classification. After a trial in proceedings initiated by respondents, the superior court issued a writ of prohibition permanently restraining the commission from hearing such petition. The commission's appeal presents the following question: Does section 117 of the charter and ordinance No. 13,011 of San Francisco authorize a property owner to apply for a zone change of another's adjoining property?

The pertinent part of section 117 reads as follows: "The city planning commission, from time to time, shall consider and hold hearings on proposed changes in the classification of the use to which property

* * * may be put * * * on the application of an interested property owner.

[1-3] "The board of supervisors, by ordinance, shall establish procedure for action on such matters. * * *" (Italics ours.) Ordinance No. 13,011, establishing such procedure, provides that the petition for rezoning shall be signed and verified *by the owner of the property*. The charter of a municipality is its constitution. In re Pfahler, 150 Cal. 71, 82, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; Platt v. City and County of San Francisco, 158 Cal. 74, 84, 110 P. 304. Any ordinance passed by a municipal corporation, within the scope of the authority expressly conferred on it, has the same force within its corporate limits as a statute passed by the Legislature has throughout the state. Ex parte Roach, 104 Cal. 272, 37 P. 1044; Weisman v. Board of Building & Safety Com'rs, 85 Cal. App. 493, 259 P. 768. To be valid, an ordinance must harmonize with the charter. South Pasadena v. Terminal Ry. Co., 109 Cal. 315, 41 P. 1093. An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the State Constitution. McQuillin, Municipal Corporations (2d Ed.) § 682. The board of supervisors, in establishing a procedure, could not deprive a property owner of a right given by the charter. Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64; Gallagher v. Foerst, 128 Cal. App. 466, 17 P.(2d) 1065. If, as respondents contend the phrase, "an interested property owner" had a narrow as well as a broad meaning, the action of the board in adopting the narrower meaning by the phrase in the ordinance—"the owner of the property"—is well-nigh, if not completely controlling. City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 191 P. 26. But if, as appellants argue, the charter phrase had a definite and well-settled meaning, the ordinance, in so far as it attempted to change that meaning, would be invalid. Flickenger v. Industrial Acc. Comm., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; Worswick, etc., Co. v. Industrial Acc. Comm., 181 Cal. 550, 185 P. 953; Pacific Gas & Electric Co. v. Industrial Acc. Comm., 180 Cal. 497, 181 P. 788.

[4-6] Various sections of the Code of Civil Procedure use the adjective "inter-

ested" to qualify or limit the "person" who can exercise procedural rights therein granted. Its meaning in those instances has been repeatedly stated in uniform decisions of the appellate courts. A person is "beneficially interested" so as to be authorized to apply for a writ of review, under the restriction stated in section 1069 of said Code, if the judicial action which he seeks to annul, injuriously affects his legal right. Harpham v. Board of Supervisors, 41 Cal. App. 192, 182 P. 324; Symons v. City & County of San Francisco, 115 Cal. 555, 42 P. 913, 47 P. 453; Damrell v. Board of Sup'rs of San Joaquin County, 40 Cal. 154; Hildebrand v. Superior Court, 173 Cal. 86, 159 P. 147; Estate of Paulsen, 35 Cal. App. 654, 170 P. 855. "The writ of mandate will not issue in a case where the plaintiff fails to show that it will subserve or protect some right or interest of his. North v. Board of Trustees, 137 Ill. 296, 27 N. E. 54. It will issue only 'on application of the party beneficially interested.' Code Civ. Proc., § 1086. The writ will not lie 'where it is apparent that the relator has no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its performance.' High's Extr. Legal Rem. § 33." Ellis v. Workman, 144 Cal. 113, 115, 77 P. 822; see, also, Eby v. Trustees of Red Bank School Dist., 87 Cal. 166, 25 P. 240; Thoits v. Byxbee, 34 Cal. App. 226, 167 P. 166; Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338. In considering the meaning of the words, "any person interested," as used in section 1327 of the same Code, conferring the right on such person to contest the validity of a will, the court, in Estate of Land, 166 Cal. 538, 543, 137 P. 246, 248, said: "It may freely be conceded that if it is made to appear that a person has such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside, he is a person interested. This would appear to be the common sense meaning of the term, and no good reason can be made to appear for giving it a broader or different meaning." The word "interested" as used in section 170 of the Code of Civil Procedure, disqualifying a judge from acting in any action in which he is interested, embraces only an interest that is direct, proximate, substantial, and certain, but not a remote, indirect, contingent, uncertain, and shadowy, interest. City of Oak-

land v. Oakland Water Front Co., 118 Cal. 249, 50 P. 268; Adams v. Minor, 121 Cal. 372, 53 P. 815; Higgins v. City of San Diego, 126 Cal. 303, 58 P. 700, 59 P. 209. "The interest in an action which disqualifies a judge who possesses it from trying the cause is a property or personal interest, an interest in the event of the suit, in the judgment which may be rendered therein. It must affect him, either in person or property, directly or indirectly." Lassen Irr. Co. v. Superior Court, 151 Cal. 357, 361, 90 P. 709, 710. "The interest mentioned in the Code [sec. 387, Code Civ. Proc.] which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105.

It is clear, therefore, that prior to the adoption of the charter, the word "interested," when used in various laws, had been given a uniform and definite meaning by the decisions of the appellate courts. When, at a subsequent time, the citizens of San Francisco and the Legislature used this exact word in the charter, the presumption is almost irresistible that they used it in the same sense which had been placed upon it by those decisions. In *re Nowak*, 184 Cal. 701, 195 P. 402. This being so, it follows that the legislative attempt in the ordinance to change the meaning of the charter phrase was ineffectual for that purpose, and that the right to apply for a zone change is only restricted, as provided by the charter, to an interested property owner. It needs no argument to show that an adjacent property owner is interested in the use to which his neighbor may legally put his property, for obviously such use must affect the value of his adjoining property, either injuriously or beneficially. The petition having been authorized by the charter, the commission did not act without or in excess of jurisdiction in proceeding to hear it, and therefore should not have been restrained from so doing.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

**JACOBSON v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY.*****L. A. 15139.**

Supreme Court of California.

June 18, 1935.

Rehearing Granted July 7, 1935.

Courts 486

Where complaint in action on disability clause of policy disclosed that exclusive jurisdiction was in municipal court, superior court improperly refused to transfer case to municipal court, although cross-complaint seeking equitable relief of cancellation was filed (Code Civ. Proc. § 89, as added by St. 1933, p. 1811, and § 396, as added by St. 1933, p. 1841; Const. art. 6, § 11a).

In Bank.

Petition by Hastrup L. Jacobson for writ of mandamus against the Superior Court of the State of California, in and for the County of Los Angeles.

Writ issued.

Ralph G. Lindstrom and Arthur H. Glanz, both of Los Angeles, for petitioner.

Gibson, Dunn & Crutcher, Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, all of Los Angeles, for respondent.

SHENK, Justice.

The petition seeks the writ of mandamus to compel the respondent superior court to transfer a cause pending therein to the municipal court of the city of Los Angeles. A general demurrer to the petition has been interposed.

On September 20, 1934, the petitioner brought an action in the respondent superior court entitled Hastrup L. Jacobson, Plaintiff, v. Aetna Life Insurance Company, defendant, numbered 378428 in the files of said court. In said action the plaintiff sought to recover a judgment in the sum of \$1,300 and interest, representing the amount alleged to have accrued pursuant to the provisions of an insurance policy providing for payment of \$50 per month on account of the permanent total disability of the plaintiff, plus the sum of \$81.20 paid as premiums since the disability the payment of which it was alleged was waived by the terms of the policy. The amounts

thus sought to be recovered, plus interest, aggregated less than \$2,000. The plaintiff also sought a declaratory judgment that he was entitled to future payments of \$50 per month during the period of permanent total disability.

On October 31, 1934, this court filed an opinion and order in the case of Brix v. People's Mutual Life Insurance Company (Cal. Sup.) 37 P.(2d) 448. In that case a similar action was filed in the superior court in San Francisco wherein the plaintiff sought to recover sums accrued under a similar policy, and installments to become due in the future. Judgment had been entered in that case for the sums which had become due under the policy, aggregating \$1,300, also for sums to become due in the future. In the opinion then filed in that case it was held that the plaintiff was not entitled to recover installments which had not accrued, that he could not obtain a judgment therefor by resort to the declaratory relief statute, and that the plaintiff consequently was not entitled to a judgment for the future installments. The decision on that branch of the case was not disturbed in the opinion filed on rehearing. (Cal. Sup.) 41 P.(2d) 537.

In November, 1934, the petitioner herein filed in the action of Jacobson v. Aetna Life Insurance Company an amended complaint, omitting, however, the allegations and prayer with reference to declaratory relief. In December, 1934, the defendant in the action filed an answer and a cross-complaint whereby it sought the cancellation of the policy by reason of the assured's alleged failure to continue payment of the premiums and the alleged consequent lapsing and termination of the policy. Thereafter, the petitioner made a motion that the cause be transferred to the municipal court on the ground that the superior court did not have jurisdiction of the cause, but that jurisdiction thereof was exclusively in the municipal court. The respondent court denied the motion and will proceed to try the action unless directed to transfer the same to the municipal court pursuant to section 396 of the Code of Civil Procedure, as added by St. 1933, p. 1841.

The parties apparently agree that the jurisdiction of the cause is properly and exclusively in the municipal court if the jurisdictional facts are governed solely by the facts appearing from the complaint.

☞ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 53 P.2d 756.

See *Shipp v. Superior Court of San Bernardino County*, 209 Cal. 671, 676, 289 P. 825; *Van Horn v. Justice's Court of San Bernardino Township*, 216 Cal. 235, 13 P.(2d) 704; Const. art. 6, § 11a.

[1-3] We may accept the defendant's view as to the nature of the cross-complaint and of the relief sought thereby. The only point necessary for determination is whether the filing of the cross-complaint purporting to set up a cause for equitable relief and seeking a judgment of cancellation of the policy, was sufficient to confer jurisdiction on the superior court pursuant to the statutes now in force. In *Brix v. People's Mutual Life Insurance Company* (Cal. Sup.) 41 P.(2d) 537, it was held that jurisdiction was conferred on the superior court by the cross-complaint wherein similar equitable relief was sought. There, however, it was pointed out that the matters pleaded in the cross-complaint at the time there involved were such as only a court of equity could take jurisdiction, and were therefore unaffected by the 1933 amendments to the Code of Civil Procedure. In 1933, section 89 was added to the Code of Civil Procedure (St. 1933, p. 1811). That section conferred certain limited equity jurisdiction on the municipal court. By subdivision 1 (c) thereof jurisdiction was vested in that court of all cases in equity when pleaded as defensive matter, in any case properly pending therein. Here we find an affirmative grant of power to the municipal court to determine the issues tendered by the cross-complaint in the event the case should be properly pending in the municipal court. Notice must then be taken of section 396 of the Code of Civil Procedure added by the statutes of 1933 (St. 1933, p. 1841), to ascertain the proper court to take jurisdiction. It is there stated that if an action is commenced in a court which lacks jurisdiction of the subject-matter thereof, as determined by the complaint, and there is a court of this state which has such jurisdiction, the action shall be transferred to the latter court as therein provided. Tested by the allegations of the amended complaint the jurisdiction of said action is in the municipal court and the motion to transfer the cause to that court should have been granted. After such transfer the municipal court would have jurisdiction of the entire cause under section 89 of the Code of Civil Procedure as enacted in 1933.

Let the peremptory writ issue accordingly.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.



PAPINEAU v. SECURITY-FIRST NAT.

BANK OF LOS ANGELES et al.*

Civ. 5341.

District Court of Appeal, Third District,
California.

June 14, 1935.

Rehearing Granted July 13, 1935.

1. Trusts ⇨283(1)

Note for \$5,000 and assignment of beneficiary's interest in trust as security, procured by trustee bank from beneficiary, held an "advantage" procured by trustee within codal provision that all transactions between trustee and beneficiary during existence of trust, or while influence acquired by trustee remains, by which trustee obtains any "advantage" from his beneficiary, are presumed to be without consideration and under undue influence (Civ. Code, § 2235).

[Ed. Note.—For other definitions of "Advantage," see Words & Phrases.]

2. Trusts ⇨283(1)

Where trustee bank procured assignment of beneficiary's interest in trust as security for payment of \$5,000 note and thereafter sold beneficiary's interest to trustee's agent and member of executive committee for benefit of beneficiaries named in trust agreement, in action by holder of subsequent assignment of beneficiary's interest, burden was on bank and buyer of interest at trustee's sale to overcome presumption of insufficient consideration and undue influence, since buyer was also a "trustee" (Civ. Code, §§ 2219, 2229, 2235).

[Ed. Note.—For other definitions of "Trustee," see Words & Phrases.]

3. Trusts ⇨283(1)

When a transfer or assignment is made by beneficiary to trustee, trustee must show that there was sufficient consideration and that no undue influence was exercised (Civ. Code, § 2235).

4. Pleading ⇨165

Allegations concerning assignment set up in defendant's answer as defense to plain-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 131.

tiff's action must be deemed denied by plaintiff.

5. Trusts ⇨283(1)

Trustee bank could not avoid duties of trustee in dealings with beneficiary of trust by claim that dealings with trustee were by bank as such and not as trustee (Civ. Code, §§ 2219, 2229, 2235).

6. Trusts ⇨283(1)

In action by subsequent assignee of beneficiary's interest in trust against trustee who procured prior assignment and trustee's agent and member of executive committee for benefit of beneficiaries in trust who bought beneficiary's interest at trustee's sale, findings that trustee had made no untrue statement to plaintiff or concealed any facts held insufficient to support judgment for defendants, where there was no proof that transactions with beneficiary were supported by sufficient consideration, and that there was no undue influence (Civ. Code, §§ 2219, 2229, 2235).

7. Trusts ⇨283(1)

That beneficiary of trust had made prior assignment of his interest as collateral security for payment of obligation did not prevent subsequent assignment of same interest, though each assignment purported to convey the whole interest, since second assignment would attach only to residue, and upon payment of debt assignor's interest would revert to him and be subject to further disposition.

8. Trusts ⇨262

In action by assignee of beneficiary's interest in trust against trustee and buyer at trustee's sale pursuant to prior assignment, evidence that plaintiff had judgment against beneficiary held admissible to show plaintiff's right to subject beneficiary's interest to payment of indebtedness.

9. Estoppel ⇨55

Where plaintiff did not rely upon and was not misled by any statements made by defendants, no basis for an estoppel existed.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by O. L. Papineau against the Security-First National Bank of Los Angeles and others. From a judgment for defendants, plaintiff appeals.

Reversed.

Le Roy B. Lorenz and Raymond Tremaine, both of Los Angeles, for appellant.

Frank P. Doherty, William R. Gallagher, and Clay & Handy, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Stripped of all verbiage, and stated in plain language, the theory upon which this case was tried, and the issues presented by the pleadings and the testimony, involves just one issue, to wit: Whether an assignment of a one-tenth interest in a certain trust made by the defendant, Vincent P. Ganahl, on the 23d day of July, 1925, or a certain other assignment of the same interest, dated July 18, 1929, should take precedence. This issue involves inquiry as to the validity of the assignment dated July 23, 1925, and the sale of the one-tenth interest made in pursuance thereof.

On the 7th day of October, 1916, Mrs. Louise Ganahl and nine other persons, including Ernest Ganahl and Vincent P. Ganahl, made, executed, and delivered to the German-American Trust & Savings Bank of Los Angeles, a certain instrument of trust, whereby certain property set forth in the record, aggregating in value many thousands of dollars, was placed in the possession, custody, and control of the German-American Trust & Savings Bank, as trustee, certain real and personal property. This instrument of trust named Louise P. Ganahl, Rose E. Donovan, Ernest Ganahl, and Mrs. Louise Ganahl as executive committee of said beneficiaries to act in behalf of all the beneficiaries named in the trust instrument. Ernest Ganahl was appointed agent of the trustee to collect the rentals of the property mentioned in the trust, and generally to care for and have the custody of the real property and the improvements thereon, as set forth in the instrument of trust. The defendant, Security-First National Bank of Los Angeles, a corporation, has succeeded to the interest of the German-American Trust & Savings Bank, and during all the times mentioned in this action was and still is the trustee, and acting under said trust instrument.

On the 23d day of July, 1925, Vincent P. Ganahl borrowed from the Security Trust & Savings Bank of Los Angeles, a corporation, the sum of \$5,000, and to secure the payment thereof within the time mentioned in a promissory note evidencing that sum, executed and delivered an assignment of his one-tenth interest in and to the trust

above mentioned. The assignment, in part, reads as follows: "This assignment, made this 23d day of July, 1925, between Vincent P. Ganahl, assignor, Security Trust & Savings Bank, a corporation, of Los Angeles, California, trustee, and Security Trust & Savings Bank, trustee under Trust G-759, payee * * * Said assignor, by these presents, hereby does assign, transfer and set over unto said trustee, in trust, with power of sale, his entire undivided beneficial interest in and to the trust, evidenced by certain declaration of trust issued by Security Trust & Savings Bank, trustee, under its Trust G-579; subject, however, to all terms and conditions of said declaration of trust; together with a like interest in and to the proceeds and avails arising or growing out of said Trust; the trustee thereunder hereby being authorized to pay and turn over unto said payee all moneys and benefits growing out of the interest hereby assigned." The instrument of assignment specifically mentions that it is given to secure the payment of the \$5,000 borrowed money, and certain costs and expenses mentioned in the assignment.

Following certain business negotiations culminating the entering into of an agreement of purchase by Vincent P. Ganahl with the plaintiff, for certain property located at Lake Arrowhead, in San Bernardino county, for the sum of \$40,000, to secure the payment of which Vincent P. Ganahl, on the 18th day of July, 1929, executed and delivered to the plaintiff a certain instrument of assignment whereby he transferred all his reversionary interest, consisting of a one-tenth interest in and to the trust first mentioned herein, to the plaintiff as security for the payment of said \$40,000, and authorized the Security-First National Trust & Savings Bank, as trustee, to pay over to the plaintiff all moneys, property, and benefits growing out of, or arising by reason of, his reversionary interest in and to said trust. On the 18th day of July, 1929, the Security-First National Trust & Savings Bank acknowledged receipt of the original of said assignment in the following words and figures: "The receipt of the original of this assignment is hereby acknowledged this 18th day of July, 1929. (Signed): Security-First National Trust & Savings Bank, By E. B. Pentz, Assistant Trust Officer."

The \$5,000 borrowed by the defendant, Vincent P. Ganahl, as aforesaid, not having been paid, the defendant bank in this action, as a trustee under the assignment

made by Vincent P. Ganahl, dated July 23, 1925, proceeded to, and did, on the 17th day of January, 1931, sell, all and singular, the interest of the said Vincent P. Ganahl in and to the trust first mentioned herein, at which sale the defendant, Ernest Ganahl, became the purchaser upon his bid of the sum of \$5,392.83.

The court found, as set forth by the respondents, that neither the defendant, Security-First National Bank of Los Angeles, nor any of its officers or agents, made any false, fraudulent, or untrue statements whatever to the plaintiff; likewise, that neither said bank, nor any of its officers, falsely, fraudulently, or otherwise concealed any matters of fact concerning said trust, or the assignment of said one-tenth interest made by the said Vincent P. Ganahl; and further found that the plaintiff had not been injured by any of the acts or conduct, statements or representations on the part of the defendants. The court further found that the officers of the defendant bank, at the time of the assignment, executed and delivered by Vincent P. Ganahl, informed the plaintiff of the prior assignment. It may be here noted that the plaintiff offered testimony controverting the finding just mentioned.

Upon the findings, the substance of which we have just mentioned, it is contended that the respondents must prevail. This contention, however, overlooks the fact that there is no finding made by the court, nor was there any testimony introduced to which our attention has been called, or which we have been able to discover by an examination of the record, conforming to, or tending to conform or comply with, the requirements of section 2235 of the Civil Code, which reads: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." There is not a word of testimony in the record that we have been able to discover indicating that the assignment made by Vincent P. Ganahl, on the 23d day of July, 1925, to the German-American Trust & Savings Bank, to the interest of which the defendant bank in this case has succeeded, and also to the performance of the obligations of which the defendant bank has assumed, was made upon sufficient consideration, and not under undue influence.

[1] That the obtaining of the note and assignment was an advantage secured by the trustee is certainly not open to question. In this particular the following language from the case of *Metropolis, etc., Savings Bank v. Monnier*, 169 Cal. 592, 147 P. 265, 268, is applicable: "The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235), clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly the obtaining of a note for \$20,000, secured by mortgage, is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction. On the question of the applicability of the presumption declared by section 2235, it is sufficient to refer to *Cooley v. Miller & Lux*, 156 Cal. 510 [512, 523], 105 P. 981, and authorities there cited. See, also, *Cooley v. Miller* [168 Cal. 120], 142 P. 83, 88."

[2] The purchaser of the one-tenth interest in the trust made by the sale of the trustee was expressly named as the agent of the trustee in the trust agreement executed and delivered as first herein stated. He was also one of the executive committee for the benefit of the beneficiaries named in said trust agreement. He was charged with looking after the properties mentioned therein, and the profits arising therefrom for the benefit of the beneficiaries, which, of course, included the interest of Vincent P. Ganahl, named in the trust agreement as one of the beneficiaries.

This brings all the actions of Ernest Ganahl within the terms and provisions of section 2219 of the Civil Code defining what constitutes a trustee. He had all the information as to the value of the trust, and he stood in the relation of confidence as to the property of said trust, as well as having control thereof.

The record shows that at the time of the sale made by the bank as trustee, and the purchase of the one-tenth interest by Ernest Ganahl, the plaintiff in this case appeared and protested against the sale,

claiming his right thereto by reason of the assignment made to him on July 18, 1929. The purchase by Ernest Ganahl invokes the application of the rule set forth in section 2229 of the Civil Code, to wit: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." We may here state that there is testimony in the record to the effect that the property included in the trust agreement was of the value of at least \$170,000, estimated by some of the testimony to be worth a great deal more, but assuming that that figure is approximately correct, the one-tenth interest would be worth at least the sum of \$17,000, of which Ernest Ganahl, as the agent of the trustee in charge thereof, must be held to have had full knowledge.

While the sale which we are considering was made by a trustee to the agent of the trustee, and the transfer was made by the trustee to its agent, we think the following rule set forth in the case of *Differding v. Ballagh*, 121 Cal. App. 1, 8 P.(2d) 201, 203, applicable: "When a trustee attempts to transfer to himself, as an individual, property of the trust, the transaction is void. The rule is thus stated in 25 California Jurisprudence, 136: 'If, acting in his fiduciary capacity, the trustee has assumed to deal with himself as an individual, the transaction will be held to be invalid. The rule is absolute; it does not depend upon any showing of bad faith on the part of the trustee, or injury to the trustor or principal. While issues in respect of the fairness of the transaction may be determinative of the controversy in the absence of any fiduciary or trust relationship, when this relationship is disclosed, any inquiry in this respect is at an end.'" This rule is found approved in 25 California Jurisprudence, page 136.

[3,4] The respondent bank, in simply offering testimony that the assignment made by Vincent P. Ganahl on the 23d day of July, 1925, was made in consideration of a loan of \$5,000, stopped short of complying with the requirements of section 2235, supra. Just as said in the case of *White v. Warren*, 120 Cal. 322, 49 P. 129, 52 P. 723, 724: "Defendant, in offering evidence tending to prove the money to be a gift from the wife, and resting his case at that point, rested too soon. Such evidence, standing alone, compassed his defeat, for by reason of the evidence the presumption of undue influence arrayed itself against

him." See, also, the case of *Wehner v. Wehner*, 68 Cal. App. 789, 230 P. 458, and cases cited in that opinion. It is not a question of actual fraud, but whenever a transfer or assignment is made by a beneficiary to a trustee, it becomes incumbent upon the trustee to introduce testimony showing that there was a sufficient consideration, and that there was exercised no undue influence. In other words, that the transfer and assignment was the free and voluntary act of the beneficiary. The defendant bank in this case has set up his assignment, made of his one-tenth interest by Vincent P. Ganahl, which, of course, under the system of pleading followed in this state, was automatically denied. *Sterling v. Smith*, 97 Cal. 343, 32 P. 320.

[5] The contention made by the respondents, in substance, that the \$5,000 was loaned by the defendant bank as a bank, and not as a bank acting as trustee under the trust assignment mentioned in this opinion, and that the bank as an individual identity separated itself into two separate capacities, and with its right hand handed out \$5,000 to the beneficiary, and with its left hand received from the beneficiary an assignment in which it was named as trustee and empowered to act as trustee, is wholly untenable.

The record shows that when the agent, Ernest Ganahl, turned over the purchase price, it was credited to the Ganahl trust.

A sufficient answer, also, to the foregoing contention of the respondents, is found in 26 Ruling Case Law, page 1325, § 189, from which we quote the following: "Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his cestui que trust. The most usual way in which evasions of this salutary rule are attempted is in purchases of the trust estate or by or in the interest of the trustee. That such purchases shall not be allowed the realization of their purpose is the universal holding of the courts, except with the express consent or under a special permission given by a court of competent jurisdiction. This wise and salutary rule, designed to protect the weak and incompetent from the encroachments and overreachings of the artful and the powerful, is founded upon two principles. The one is, that the trustee has no right to derive any benefit or advantage from the trust fund; but all his skill and labor in

the management of it must be directed to the advancement of the interest of his cestui que trust, and the other is that a trustee will not be permitted to create in himself an interest opposite to that of the party for whom he acts."

In support of the rules which we have heretofore stated, we may also cite the following cases: *In re Frazin & Oppenheim* (C. C. A.) 181 F. 307; *Mamlock v. Williams*, 55 Cal. App. 175, 202 P. 927; *City of Fort Bragg v. Brandon*, 41 Cal. App. 227, 182 P. 454; 2 *Pomeroy Eq. Juris.*, § 958.

[6] Not having introduced any testimony relative to the sufficiency of the consideration, or that the assignment it received was not executed under undue influence, it follows that the burden of proof cast upon the respondent bank by section 2235, supra, has not been sustained; and the findings referred to in respondents' brief, of which we have made mention, without there being further testimony and further findings, are insufficient to sustain the judgment of the court in this case.

As the case must go back to the trial court for further hearing, it is unnecessary to mention further points urged by the appellants.

[7] We find nothing in the record which sustains the appellant's contention that the oral testimony introduced tended in any way to controvert any of the written instruments. The fact that Vincent P. Ganahl had made an assignment to the trustee of his interest in the trust estate as collateral security for the payment of an obligation did not prevent him from making a subsequent assignment of the same interest. The legal effect, if both instruments were valid, would be that the first assignment would carry sufficient of his interest to discharge the first obligation, and that the second assignment would convey to the assignee named therein the residue of his interest. That each assignment purported to convey the whole interest is wholly immaterial. Being made to secure the payment of money, the instant the obligation was discharged, for the payment of which the assignment was made, all the overplus of the assignor's interest would revert to him and be subject to further disposition.

[8] Evidence that the plaintiff had a judgment against Vincent P. Ganahl, we think admissible, not for the purpose of binding the other respondents, but for the

purpose of showing, among other things, the insolvency of Vincent P. Ganahl, and the right of the plaintiff to subject the one-tenth interest in the trust estate referred to herein to the payment of the indebtedness of Vincent P. Ganahl to the plaintiff.

[9] We find nothing in the question of estoppel, as it does not sufficiently appear that the plaintiff relied upon or was misled by any statements of any of the officers of the respondent bank.

By reason of failure to sustain the burden of proof placed upon the respondents by section 2235, supra, and the authorities herein cited, the judgment of the trial court must be, and the same is hereby, reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



7 Cal.App.2d 590

NICHOLAS v. LESLIE et ux.

Civ. 9134.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Appeal and error ⇨933(4)

It will be presumed that trial court in setting aside verdict for defendants in action for injuries was not satisfied with testimony tending to show that defendant was not negligent and that plaintiff was guilty of contributory negligence.

2. New trial ⇨70

Evidence that driver of automobile failed to see pedestrian walking across street at or near crosswalk and collided with her held sufficient to warrant setting aside verdict for defendant, on ground of defendant driver's negligence (St. 1931, p. 2127, § 131½).

3. Automobiles ⇨160(4)

Driver of automobile owes duty to know whether pedestrians are using crosswalk, and failure to yield right of way to pedestrians using crosswalk is negligence per se (St. 1931, p. 2127, § 131½).

4. Automobiles ⇨206

Pedestrian crossing intersection at crosswalk had right to assume that she would be given right of way over automobile (St. 1931, p. 2127, § 131½).

5. Automobiles ⇨245(72)

New trial ⇨70

Whether pedestrian crossing street at or near crosswalk in front of approaching automobile was guilty of contributory negligence held question of fact under evidence in action for injuries, and trial court did not err in resolving question in plaintiff's favor by setting aside verdict for defendants.

6. Automobiles ⇨217(6)

Pedestrian is not necessarily guilty of negligence as matter of law in attempting to cross street ahead of automobile which he sees approaching some 45 or 50 feet distant.

7. Appeal and error ⇨996

Where different conclusions may reasonably be drawn from established facts upon questions of negligence and contributory negligence, finding of trial court will not be disturbed.

8. Appeal and error ⇨933(1), 979(2)

Presumptions are in favor of order granting new trial, and order granting new trial for insufficiency of evidence will not be reversed, except upon showing of manifest abuse of discretion.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Rosa Nicholas against Thomas A. Leslie and wife. There was a verdict for defendants, and, from an order granting plaintiff's motion for new trial, defendants appealed.

Affirmed.

Heaney, Price & Postel and Clarence A. Rogers, all of Santa Barbara, for appellants.

Smith & Delwiche, of Santa Barbara, for respondent.

SHINN, Justice pro tem.

The defendants appeal from an order granting plaintiff's motion for a new trial in an action for personal injuries in which the verdict of the jury was in favor of the defendants.

Insufficiency of the evidence to sustain the verdict was specified by the court as one of the grounds upon which the motion was granted.

[1] Plaintiff was struck by an automobile of the defendants while she was crossing a street in the city of Santa Barbara. Appellants claim the order granting a new trial upon this ground was erroneous, for

the reason that no negligence of Victoria Leslie, the driver of the automobile, was shown, and because it appears from the plaintiff's testimony, as a matter of law, that she was guilty of contributory negligence. If either of these contentions should be upheld, the order should be reversed. If, upon the other hand, there is evidence from which conclusions may reasonably be drawn that defendant Victoria Leslie was guilty of negligence and plaintiff was not guilty of contributory negligence, the order should be affirmed. In such a case it will be presumed that the trial court, in granting the motion, was not satisfied with such of the testimony of the witnesses as tended to show that defendant was not negligent and plaintiff was guilty of contributory negligence. Examination of the record readily discloses testimony which amply supports the court's order.

[2, 3] Plaintiff, a woman about 70 years of age, was crossing Santa Barbara street at the intersection of Haley street, from the southwest to the southeast corners of the intersection. Haley street is 42 feet wide between curbs. Santa Barbara is 40½ feet wide between curbs. The distance between curb and property lines on the south side of Haley street is 8 feet 4 inches, and that would be the width of the pedestrian crosswalk across Santa Barbara street. A painted line on the pavement crossing Santa Barbara marked the extension of the property lines of Haley street. There were boulevard stop signs on Santa Barbara, requiring motorists to stop before crossing Haley street. Plaintiff was walking easterly on the south sidewalk of Haley street, and, when she came to Santa Barbara, she there saw the automobile of defendants approaching from the north. Its exact location when she first saw it is not clearly indicated in her testimony. Appellants quote her statement that she first saw the car "coming through," as proving that the car had entered the intersection before she saw it, but, from a reading of her entire testimony, we understand that she observed the car when it was some distance north of the intersection. Plaintiff did not display a good command of the English language, which, we think, accounts for the somewhat confusing use of the expression quoted and which we think has been misinterpreted by appellants' counsel.

Plaintiff admitted not having looked again after first seeing the automobile.

She testified that she thought the automobile would stop and that she could cross the street in safety. She took eight or nine steps into the street, when she was struck by the right front fender or bumper of the car. She was shoved along a short distance and fell, sustaining a fractured rib, fractured wrist, and other injuries.

The evidence shows that the driver, Victoria Leslie, stopped her car at the boulevard stop on the north side of Haley street and drove across the intersection in second gear, at a speed of 10 or 12 miles per hour. It is not claimed that she violated the law in any way in the operation of her car, other than to fail to give due heed to the rights of pedestrians and to yield the right of way to the plaintiff, as she was required to do under the provisions of section 131½, California Vehicle Act (St. 1923, p. 517, § 131½, as added by St. 1931, p. 2127), if plaintiff was crossing the street in a crosswalk.

Mrs. Leslie testified that plaintiff suddenly appeared in front of her car, or, as she put it, "shot out" into the path of the car. The evidence was in conflict as to the exact point where plaintiff was struck, whether in the crosswalk or to the south of it. Defendants' car stopped almost immediately after striking plaintiff. Mrs. Leslie testified that as she drove across the intersection she was looking to the right and left and ahead of her, but that she did not see plaintiff until she observed her immediately in front of the right headlight of the car, and that she did not know how plaintiff got there; that she immediately turned to the left in an effort to avoid striking plaintiff and stopped her car almost on the spot. The order granting a new trial necessarily implies that the trial court believed there was evidence that Mrs. Leslie was negligent. We think this was a reasonable conclusion to be drawn from her own testimony. While plaintiff was walking eight or nine steps from the curb to a point about midway in the west half of Santa Barbara street, defendants' car, at a speed of ten or twelve miles per hour, traveled several times as far as plaintiff did. The accident happened at 9:30 a. m., the day was clear, and defendants' view of the crosswalk was unobstructed. There is testimony that plaintiff might have been concealed behind a telephone pole as she stood on the curb. It may be conceded that defendant might have been excusable in failing to notice

plaintiff in that location, but it is altogether reasonable to say, upon the evidence then before the court, that defendant was negligent in failing to see plaintiff as she walked across the street. It was defendant's duty to know whether pedestrians were using the crosswalk. It was her duty to yield the right of way to plaintiff, and this she did not do. She therefore violated the provisions of section 131½ of the California Vehicle Act, and her act in so doing was negligence per se.

Much reliance is placed by appellants upon the testimony that plaintiff was struck some distance south of the crosswalk, but the evidence is conflicting upon that point. Plaintiff's testimony is not entirely clear as to her position with reference to the crosswalk, whether she was inside or just outside of it. But, if it be assumed that she was from one to two feet outside of the crosswalk at the time she was struck, which is the most favorable construction of her testimony that appellants can reasonably claim, we think the fact is unimportant. If defendant had made careful observation to see whether pedestrians were in the crosswalk, she would have seen plaintiff; if plaintiff had been walking a few feet farther north and clearly in the crosswalk, she would have been struck just the same, because defendant did not see her until it was too late to avoid striking her. Under the facts of this case, the rights and duties of the parties were the same whether plaintiff was walking just within or just without the boundary of the crosswalk. Where a pedestrian, though not precisely within a crosswalk, is struck by a vehicle while it is passing through one, it would be unreasonable to hold that the vehicle had the right of way or that the pedestrian had not.

[4-7] There is evidence in the record from which the court might have believed that plaintiff, before starting to cross the street, observed defendants' automobile 60 or more feet distant. Plaintiff's testimony that she believed the automobile would stop is sufficient to show that she believed she would be given the right of way over the machine. She had a right so to believe, and to govern her conduct accordingly. Whether she relied unreasonably upon such right, whether she was negligent in misjudging the speed of defendants' car or in failing to look a second time, were questions of fact for the trial court. The extent of care to be exercised

by a pedestrian in crossing a street must necessarily be relative to the condition of traffic and the particular surroundings.

This court cannot say that plaintiff was guilty of negligence as a matter of law. The determination of the trial court that the evidence of plaintiff's negligence was not satisfactory, supported as it is by reasonable deductions from the facts in evidence, is binding upon an appellate court. A pedestrian is not necessarily guilty of negligence as a matter of law in attempting to cross a street ahead of an automobile which he sees approaching some 45 or 50 feet distant. *Collom v. Bloch*, 70 Cal. App. 33, 232 P. 486. The question whether a pedestrian was negligent in crossing a street under the circumstances disclosed by the evidence is primarily one for the trial court. *Coursault v. Schwebel*, 118 Cal. App. 259, 5 P.(2d) 77; *Flach v. Fikes*, 204 Cal. 329, 267 P. 1079; *Miller v. Schimming*, 129 Cal. App. 171, 18 P.(2d) 357. Without discussing the many cases cited by appellants, we may say that there is to be found therein nothing in conflict with the well-established rule that, where different conclusions may reasonably be drawn from the established facts upon questions of negligence and contributory negligence, the finding of the lower court will not be disturbed. The rule is applicable to the situation presented on this appeal.

The fact that the defendant Mrs. Leslie did not yield the right of way to plaintiff and the testimony of plaintiff that she leisurely crossed the street in the belief that she could do so with safety, which belief was the more reasonable because of her superior right, amply sustain the decision of the trial court that the jury erroneously decided the questions of negligence and contributory negligence in defendants' favor.

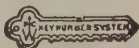
[8] The presumptions are in favor of the order granting a new trial (*Weaver v. Shell Oil Co.*, 129 Cal. App. 232, 18 P.(2d) 736), and the invariable rule is that an order granting a new trial upon the ground of insufficiency of the evidence will not be reversed except upon a showing of manifest abuse of discretion. (*Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156, 47 P. 1019). The instant case fails to meet that requirement.

Since for these reasons the order must be sustained, it becomes unnecessary to determine whether the new trial might

properly have been granted upon other grounds discussed in the briefs of counsel.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 494

FRANCESCHI v. SCOTT et al.

Civ. 9644.

District Court of Appeal, First District,
Division 2, California.

June 10, 1935.

Hearing Denied by Supreme Court

Aug. 8, 1935.

Limitation of actions ☞31

One-year limitation held applicable to action for injuries incurred in automobile collision against owner of automobile which was driven with owner's permission, since owner's liability was for imputed negligence arising from permission to another to operate automobile causing injury, and legislation was not intended to impose greater burden for imputed negligence than that which existed for actual negligence in so far as time of suit is concerned (Code Civ. Proc. § 340, subd. 3; Civ. Code, § 1714¼).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Pasquali Franceschi against T. C. Scott and others. From a judgment of dismissal after sustaining demurrer to complaint, plaintiff appeals.

Affirmed.

Faulkner, Doyle & Sanford, of San Francisco (Henry G. Sanford, of San Francisco, of counsel), for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondents.

NOURSE, Presiding Justice.

On February 24, 1934, plaintiff filed his complaint for damages for injuries incurred in an automobile collision on September 15, 1932. Gertrude Scott was sued in her sole capacity as owner of the car involved in the collision, which was oper-

ated at the time by T. C. Scott with her permission. Her demurrer on the ground that the action was barred by section 340 of the Code of Civil Procedure was sustained, and the appeal is from the judgment of dismissal which followed that order.

Subdivision 3 of section 340 of the Code of Civil Procedure limits to one year the commencement of all actions for damages "for the injury to * * * one caused by the wrongful act or neglect of another." Subdivision 1 of section 338 of the Code of Civil Procedure limits to three years all actions "upon a liability created by statute." Section 1714¼ of the Civil Code imputes negligence to the owner of a motor vehicle where one has been injured through the negligence of another in operating the vehicle with the permission, express or implied, of the owner. The sole question on this appeal is whether the cause of action is limited by the provisions of section 338 or of section 340.

The precise question was presented to us in *McFarland v. Cordiero*, 99 Cal. App. 352, 278 P. 889, relating to the liability of a parent for the negligence of a minor based upon section 62 of the California Vehicle Act. In that case we held that, when a parent signs the application of a minor to operate a motor vehicle, "he places himself in the same position and under the same statute of limitations as the operator." 99 Cal. App. 352, page 355, 278 P. 889, 890. In so holding, we treated the section of the vehicle act as a special statute imposing a liability upon the parent or guardian where none before existed, but emphasized the fact that the parent's liability was one for imputed negligence, arising not because of the statute alone, but because of his signing the minor's application for a license. The same principle controls here. The owner's liability under section 1714¼ of the Civil Code is a liability for imputed negligence arising from his permission to another, express or implied, to operate the car causing the injury. The cause of action is strictly and solely one in tort for injuries arising out of the negligence of the operator; hence, the cause accrues at the time of the negligent act. And no matter what form of language we use, the cause of action is one "for the injury to * * * one caused by the wrongful act or neglect

of another" within the express terms of subdivision 3 of section 340.

This section is a special statute controlling the time within which an action covering such injuries may be commenced. The section of the Civil Code merely adds new persons who may be sued for such injuries on the basis of imputed negligence. But there is nothing in any of this legislation which would indicate an intention to impose a greater burden for imputed negligence than that which existed for actual negligence in so far as the time of suit is concerned. In accord upon the general principles discussed are *Huntly v. Zurich Gen. A. & L. Ins. Co.*, 100 Cal. App. 201, 211, 280 P. 163; *County of Sonoma v. Hall*, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459; *Kerrison v. Unger*, 135 Cal. App. 607, 610, 27 P.(2d) 927; *Harding v. Liberty Hospital Corporation*, 177 Cal. 520, 524, 171 P. 98.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



**NELSON v. FERNANDO NELSON &
SONS (two cases).***

Civ. 9424, 9451.

District Court of Appeal, First District,
Division 1, California.

June 3, 1935.

Rehearing Denied July 3, 1935.

Hearing Granted by Supreme Court
Aug. 1, 1935.

1. Vendor and purchaser ⇨341(3)

In action to recover amounts paid on property which plaintiff's husband had purchased from defendant and agreed to convey to her under property settlement agreement and which defendant had conveyed to others, evidence held to support finding that defendant and plaintiff's husband had not canceled contract.

2. Vendor and purchaser ⇨214(1)

Where husband contracted to purchase property from defendant which he agreed to convey to his wife under property settlement agreement, assignment by plaintiff's husband

to her of his rights under contract operated to transfer his rights under the contract to plaintiff although the burdens of the contract still rested on him.

3. Vendor and purchaser ⇨214(5)

Where defendant agreed to sell property to plaintiff's husband, which he was to convey to her under property settlement agreement, and husband assigned his rights under agreement to plaintiff, after defendant had notice of assignment it could no longer deal with husband as owner of rights under contract and to foreclose plaintiff of her rights thereunder, defendant was required to have tendered deeds to her and demanded payment of balance due.

4. Evidence ⇨314(1)

On issue of value of property which plaintiff's husband had agreed to purchase from defendant and to convey to plaintiff in settlement of her rights under property settlement agreement and which defendant, after notice of assignment of agreement to plaintiff, had conveyed to others, bank appraisements of property, two of which were made considerably before and a third almost a year after repudiation of contract by defendant, held incompetent and inadmissible as hearsay.

5. Evidence ⇨113(15, 16), 142(1)

Value of property cannot be proved by evidence of sales of other property or of offers to buy or sell property in question.

6. Vendor and purchaser ⇨341(3)

In action to recover amounts paid on property by plaintiff's husband, which he agreed to convey to her under property settlement agreement and which defendant conveyed to others, evidence supported finding that \$10,000 was paid on purchase price of property notwithstanding that such amount was borrowed on security of part of property which was up to that time the property of defendant and that defendant indorsed the note given for its payment and therefore rendered itself liable thereon.

7. Trial ⇨404(2)

In action to recover amounts paid on property by plaintiff's husband, which he agreed to convey to her under property settlement agreement and which defendant conveyed to others, finding as to amount of plaintiff's damages held a legal conclusion which could not stand if it was contrary to other findings.

8. Trial ⇨398

Findings apparently contrary to one another should be reconciled if possible so as to support judgment.

9. Trial ☞398

In action to recover amounts paid on property by plaintiff's husband, which he agreed to convey to her under property settlement agreement and which defendant conveyed to others, finding that plaintiff's husband transferred to defendant property of a net value greater than his monetary obligations to defendant held not construable as a finding that plaintiff's husband had paid the full balance of the purchase price of the lots by such transfer where such construction would make finding conflict with other findings and payment of balance of purchase price of property and delivery of deeds there-to were expressed by contract to be concurrent conditions.

10. Vendor and purchaser ☞341(5)

In action to recover amounts paid on lots by plaintiff's husband, which he agreed to convey to her under property settlement agreement and which defendant conveyed to others, where court found that defendant refused to recognize any rights of plaintiff under contract and assignment, breach of entire contract was complete as to all lots and plaintiff was entitled to her action for damages as to all of them as against contention that contract as to each lot was severable.

11. Vendor and purchaser ☞351(1)

Willful and deliberate refusal to perform without just cause or excuse amounts to "bad faith" within statute relating to recovery of damages caused by breach of agreement to convey estate in real property (Civ. Code, § 3306).

[Ed. Note.—For other definitions of "Bad Faith," see Words & Phrases.]

Appeal from Superior Court, San Francisco County; Michael J. Roche, Judge.

Action by Mrs. Grace Deering Nelson against Fernando Nelson & Sons. From the judgment, plaintiff appeals and defendant cross appeals.

Modified and affirmed.

Carroll Single and Stanley J. Cook, both of San Francisco, for Grace Deering Nelson.

W. P. Caubu, of San Francisco, for Fernando Nelson & Sons.

DOOLING, Justice pro tem.

Cross-appeals are presented herein from a judgment in favor of plaintiff for \$2,500 with interest from May 2, 1929. Plaintiff appeals on the judgment roll alone, claiming that under the findings she is entitled

to a judgment for \$18,250 with interest. Defendant on its appeal presents a type-written transcript of the evidence and urges that the evidence does not support the findings in a number of particulars.

In 1926 plaintiff and Frank F. Nelson were husband and wife. Marital differences between them having become acute, on August 11, 1926, they entered into a property settlement agreement. As a part of said agreement Frank F. Nelson agreed to convey to plaintiff three certain lots of land, and to each of their two children one lot of land. Title to these five lots at the date of said agreement was in the defendant herein.

On August 12, 1926, defendant and Frank F. Nelson entered into a contract of purchase and sale of said five lots wherein and whereby defendant agreed to sell said five lots to Frank F. Nelson. By the terms of this agreement Frank F. Nelson was to make a total down payment of \$10,000 and to give his note for the balance of the purchase price of one lot, which we shall designate as the Lincoln Way lot. As to the other four lots, the agreement was silent as to the time for paying the balance on the price of each or any of them, but the agreement recited in this regard: "The delivery to the Purchaser of a good and sufficient deed conveying title to said property and the payment of the balance of the purchase price are concurrent conditions."

The evidence shows that in order to finance the down payments on the five lots a bank mortgage of \$10,000 was placed on the Lincoln Way lot to secure a promissory note in that amount executed by plaintiff and Frank F. Nelson and indorsed by defendant. The \$10,000 thus borrowed was paid to defendant and applied as follows: \$7,000 on the purchase price of the Lincoln Way lot; \$1,000, respectively, on each of two other lots which by the terms of their property agreement Frank F. Nelson was to convey to plaintiff; and \$500, respectively, on each of the lots which by such agreement Frank F. Nelson was to convey to the children. As a part of this transaction, title to the Lincoln Way lot was conveyed to plaintiff forthwith.

On August 13, 1926, Frank F. Nelson assigned to plaintiff all of his rights in the aforesaid contract of purchase and sale, and covenanted with her to perform all of its obligations. On May 2, 1929, defendant herein conveyed one of the lots cov-

ered by its said contract of sale with Frank F. Nelson to a third party for \$5,000. On learning of this sale, plaintiff demanded of defendant that it pay to her the difference between the selling price to the third party and the price fixed in its agreement of sale with Frank F. Nelson, and defendant thereupon notified plaintiff that it recognized no rights in her under said contract on the expressed ground that the contract was with Frank F. Nelson. This suit followed, in which plaintiff sought to recover from defendant the amounts paid upon the four lots plus the difference between the selling price to Frank F. Nelson and the market value of the lots on May 2, 1929, the date of its repudiation of the contract. It further appears that defendant was a family corporation, the stock of which was all held by a father and five children, one of the children being Frank F. Nelson.

With this preliminary statement, we shall proceed to a consideration of the findings of fact attacked by defendant as unsupported by the evidence. The court found that "from and after about said date of August 13, 1926, defendant knew and was informed of said assignment by said Frank F. Nelson to plaintiff." Plaintiff testified positively that in July or August, 1927, she personally presented the assignment to Fernando Nelson, the president of defendant corporation. Without affecting the rights of the parties in any way, we may accept this date as the date of first notice to the defendant. Accordingly this finding is ordered modified by changing the words therein "said date of August 13, 1926" to read "August, 1927."

[1] The court found that "after the execution of said contract, the down payment of \$10,000, defendant and said Frank F. Nelson and plaintiff, each and all of them, allowed said contract to continue in full force and effect without further performance by either of them"; and further that "it is untrue that defendant and said Frank Nelson mutually rescinded or canceled or terminated or abandoned said contract on August 14, 1926, or at any other time, or at all"; and that "said defendant Fernando Nelson & Sons, a corporation, did duly approve and execute said contract, and did at all times thereafter, until May 2, 1929, recognize said contract as being in full force and effect."

It is claimed by defendant that defendant and Frank F. Nelson mutually abandoned

said contract in August, 1928, by oral agreement. Against this testimony plaintiff showed five bills sent by defendant to plaintiff covering taxes and sidewalk costs on these lots in 1927 and 1928, and on October 29, 1929, after its repudiation of the contract, defendant sent a letter to plaintiff purporting to cancel three such bills on the ground stated in the letter: "These bills were wrongly charged to your personal account as the contract on Lot 17 Block 3273 Lot 2 Block 2484 is with Frank F. Nelson, we are therefore charging his account." The account books of the corporation also show charges against plaintiff in connection with these lots which remained on the books unchanged until after the repudiation of May 2, 1929, and a charge against Frank F. Nelson on August 1, 1929, in connection with the contract for the purchase of the lots.

This evidence is ample to support the findings above set out. It is sufficient to support an inference that defendant recognized plaintiff's interest in the contract until May 2, 1929, and recognized the contract as existing and in force between it and Frank F. Nelson even after that date, and is entirely inconsistent with the theory of a mutual abandonment by Frank F. Nelson and defendant in 1928.

[2, 3] In addition to this, defendant had notice of the assignment to plaintiff in August, 1927. The effect of the assignment was to transfer all of Frank F. Nelson's rights under the contract to plaintiff (*Harris v. Miller*, 196 Cal. 8, 17, 18, 235 P. 981; *Kemp v. Enemark*, 194 Cal. 748, 756, 230 P. 441; *Laack v. Dimmick*, 95 Cal. App. 456, 469, 273 P. 50), although the burdens of the contract still rested upon Frank (*Lisenby v. Newton*, 120 Cal. 571, 52 P. 813, 65 Am. St. Rep. 203). It would be highly inequitable under such circumstances to permit Frank to surrender by agreement the rights in the contract which were no longer his property but had become the property of plaintiff by his assignment. After defendant had notice of such assignment, it could no longer deal with Frank as the owner of the rights under the contract. To foreclose plaintiff of her rights, it should have tendered deeds to her and demanded payment of the balance as was done in *Drips v. Moore*, 179 Cal. 249, 252, 176 P. 159.

[4, 5] It was further found that "on May 2, 1929, the market values of the lots were: Southwest corner West Portal Avenue and

15th Avenue, \$5000; Block 3273, Lot 17, \$4750; Lot 30, \$4000; Lot 33, \$4500."

Appellant admits that the evidence supports the finding of the value of the first lot as \$5,000. As to the others, the only evidence of their value on May 2, 1929, was: First, evidence of bank appraisements made for mortgage purposes, one appraisal made in 1930, and the others in 1925; second, testimony of Frank F. Nelson as to the value of the lots in 1926; and, third, a memorandum prepared by Frank F. Nelson in 1926 for use in negotiating the property agreement with his wife. Frank Nelson testified that property values decreased rapidly after 1926, and that he was unfamiliar with the values of these lots in 1929.

It may be said of all this evidence that none of it is competent to prove values on May 2, 1929. Frank Nelson's testimony of values in 1926, conceding that it might otherwise not be too remote, is completely nullified by his testimony of decrease in values between 1926 and 1929, and his further positive testimony that he did not know the 1929 values. The bank appraisements were made, two considerably before and the third almost a year after May 2, 1929. They were both hearsay and incompetent. Such evidence is in the same category as evidence of offers to buy or sell, or sales of other property. "No rule is better settled in California than the rule that the value of property cannot be proved by evidence of sales of other property, or of offers to buy or sell the property in question." *Merchants' Trust Co. v. Hopkins*, 103 Cal. App. 473, 478, 284 P. 1072, 1074, and cases cited.

There being no competent evidence pointed to in the record to support a finding for these three lots of any value on May 2, 1929, in excess of the prices fixed in the contract with Frank F. Nelson, finding V is accordingly ordered modified to read: "On May 2, 1929, the market value of the lot on the southwest corner West Portal Avenue and 15th Avenue was \$5,000, and the market value of lots 17, 30 and 33, block 3273, and each of them, was not greater than the purchase price fixed for said three lots in the agreement between Fernando Nelson & Sons, Inc., and Frank F. Nelson executed August 12, 1926, a copy of which is attached to plaintiff's complaint herein and marked 'Exhibit A.'"

Two other findings are also attacked by defendant; one reading, "Said final pay-

ments were to be payable on or before August 12, 1929," becomes immaterial in view of the finding already approved herein that all parties "allowed said contract to continue in full force and effect without further performance by either of them." The other finding, that "in 1927 Frank Fernando Nelson indorsed and defendant corporation took over 40 shares of Frank Fernando Nelson's stock and over 10 houses partially built by him of a net value greater than his monetary obligations to defendant" will be discussed in connection with plaintiff's appeal herein.

[6] Defendant also attacks the finding that \$10,000 was paid on account of the purchase price of the various lots. The basis of this attack is that the \$10,000 was borrowed on the security of the Lincoln Way lot which was up to that time the property of defendant, and that defendant indorsed the note given for its payment, and therefore rendered itself liable thereon. The primary liability to the bank, however, was that of the makers of the note, plaintiff and Frank F. Nelson, and the money was borrowed by them. In return for the payment of \$7,000 of this money and the agreement of Frank Nelson to pay the balance of the purchase price of this lot, the lot was conveyed by defendant. Neither the existence of defendant's vendor's lien for the unpaid balance on the purchase price of this lot, nor the secondary liability of defendant as an indorser of the note, can change the fact that the money was borrowed by plaintiff and Frank Nelson and by them paid to defendant. The mortgage has since been renewed, defendant again indorsing the note. We need not here determine what would be defendant's rights in the event of default, foreclosure, and deficiency judgment against defendant as indorser. Suffice it to say that none of those contingencies was shown to have arisen.

Passing now to plaintiff's appeal, it was found by the court in findings IX and X as follows:

"IX. On May 2, 1929, and at the time of defendant's repudiation of plaintiff's rights as above set forth, plaintiff's assignor, said Frank Nelson, had paid the sum of \$3,000 on account of said four lots, allocated as follows:

"1. \$1,000 on the lot on the southwest corner of West Portal Avenue and Fifteenth Avenue.

- "2. \$1,000 on Lot 17, Block 3273.
- "3. \$500 on Lot 30, Block 3273.
- "4. \$500 on Lot 33, Block 3273.

"The \$5,000 received by defendant from said Mabel G. Hunter for said lot, as set forth in Paragraph VII above, exceeded the contract price to said Frank Nelson and to plaintiff by the sum of \$1,500."

"X. Plaintiff, therefore, has been damaged in the total sum of \$2,500, being the \$1,000 paid down by plaintiff's assignor, said Frank Nelson, on the said 15th Ave. lot, plus the \$1,500 received by defendant from said Mabel G. Hunter over and above the price of \$3,500 at which defendant had previously agreed to sell said one lot to plaintiff's assignor as above set forth."

[7-9] It is plaintiff's position that finding X is really a conclusion of law, although set out among the findings of fact, and that such conclusion of law is erroneous in that the findings of fact compel the allowance of a much greater sum in damages. That this finding is no more than a legal conclusion which cannot stand if it is contrary to the other findings we agree. We therefore proceed to examine plaintiff's contentions in this regard. In this connection plaintiff points to section 3306 of the Civil Code: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid * * * but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. * * *"

As to the price paid, plaintiff argues from the finding that Frank Nelson in 1927 transferred to defendant property "of a net value greater than his monetary obligations to defendant" that the court found that Frank Nelson in 1927 paid the full balance of the purchase price of the four lots in question in this manner. We do not so construe this finding. If that is its meaning, it is in conflict with the other finding that the parties "allowed said contract to continue in full force and effect without further performance by either of them." It is elementary that findings apparently contrary to one another should be reconciled if possible so as to support the judgment, but in fact the two findings are not contradictory. The payment of the balance of the purchase price and the delivery of deeds to the lots were expressed by the contract to be concurrent conditions. Frank Nelson could only become liable for

the payment of the balance upon a tender of such deeds by defendant. *Benson v. Shotwell*, 87 Cal. 49, 59, 25 P. 249; *Boone v. Templeman*, 158 Cal. 290, 297, 110 P. 947, 139 Am. St. Rep. 126. It follows that the payment of the balance of the purchase price of these lots was not among Frank Nelson's "monetary obligations to defendant" in 1927. The finding can in no sense be construed as a finding that Frank Nelson paid defendant the balance of the purchase price of the lots in 1927.

[10] We agree with plaintiff, however, that under the findings she is entitled to judgment for the sum of \$1,000 paid down on lot 17 and the sums of \$500 each paid down on lots 30 and 33, all in block 3273. These sums, aggregating \$2,000, were paid out of the original \$10,000 bank loan. Defendant argues that the contract as to each lot was severable, and that the refusal to pay plaintiff the difference between the balance due on the Lincoln Way lot and the price at which it was sold to Mabel Hunter was not a breach as to the other three lots. The court found, however, as to this: "Defendant then and there entirely repudiated and refused to recognize any rights of plaintiff under said contract and said assignment." Upon such repudiation the breach of the entire contract was complete as to all lots, and plaintiff was entitled to her action for damages as to all of them. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 778, 186 P. 356.

[11] The last question to be considered depends upon the "bad faith" provision of section 3306, Civil Code. It has been repeatedly held that the willful and deliberate refusal to perform without just cause or excuse amounts to bad faith within the meaning of this Code section. *Haight v. Marin Mun. Water Dist.*, 208 Cal. 753, 756, 757, 284 P. 926; *Johnson v. Schimpf*, 197 Cal. 43, 47, 239 P. 401; *Clark v. Yocum*, 116 Cal. 515, 518, 48 P. 498. If there was any doubt cast on this rule by *Wilson v. Rosenkranz*, 112 Cal. App. 511, 297 P. 44, or the opinion of the Supreme Court in denying a hearing in *Shaw v. Union Escrow & Realty Co.*, 53 Cal. App. 66, 71, 200 P. 25, the later Supreme Court cases above cited would seem to put such doubt at rest.

Accordingly, as to the lot sold to Mabel Hunter the court properly allowed plaintiff \$1,500 for loss of bargain. As to the other three lots, no such damages can be allowed because of our holding that the finding of

any value for them in excess of the contract price on May 2, 1929, is without evidentiary support. Plaintiff's recovery against defendant should accordingly be increased from the principal sum of \$2,500 to \$4,500 by adding thereto the \$2,000 down payment on the other three lots.

In accordance with the views herein expressed, finding X is ordered stricken from the findings of fact, and the conclusions of law are ordered modified to read as follows: "From the foregoing findings of fact, the court concludes, as a matter of law, that plaintiff is entitled to judgment against defendant Fernando Nelson & Sons, a corporation, in the sum of \$4,500 with interest thereon at the rate of 7% per annum from and after May 2, 1929, until paid, and for costs of suit."

The judgment is ordered modified to provide for the recovery of said sum of \$4,500 with interest thereon as aforesaid and as so modified it is affirmed, neither party to recover costs on appeal.

We concur: TYLER, P. J.; CASH-IN, J.



7 Cal.App.2d 559

UNITED FARMERS ASS'N OF CALIFORNIA v. SAKIOKA et al.
Civ. 9451.

District Court of Appeal, Second District,
Division 2, California.

June 13, 1935.

1. Joint adventures ☞

Relationship of "joint adventurers" is similar to that of partners; essential element being that parties share in profits and losses.

[Ed. Note.—For other definitions of "Joint Adventurer," see Words & Phrases.]

2. Joint adventures ☞

Relation of joint adventurers held not created by contract between crop grower and farmers' association which lent money to grower for purpose of cultivating crop and under which contract association was employed as grower's exclusive agent and factor to sell and dispose of described crop, and

whereby grower agreed to repay association for loan with interest at certain rate.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the United Farmers Association of California against K. Sakioka and another. From a judgment, defendants appeal.

Affirmed.

J. Marion Wright, of Los Angeles, for appellants.

Louis B. Stanton, of Los Angeles, for respondent.

CRAIL, Justice.

The sole contention on this appeal is that the contract which was entered into between the parties did not create the relation of debtor and creditor, but did create the relation of joint adventurers. All other questions in the case are incidental to and dependent upon this fundamental contention. If it falls, all fall.

The contract when boiled down reads as follows: "1st: Grower (defendants-appellants) is the owner of a crop of celery which is now standing and growing on a certain land consisting of 50 acres more or less, which land is located at Sawtelle, California. Second: Company (plaintiff-respondent) has this day advanced Grower the sum of Five Thousand (\$5,000.00) Dollars, all to be used by grower in caring for, cultivating and harvesting the above mentioned crop. Third: Grower hereby employs Company as his sole and exclusive agent and factor to sell and dispose of the above described crop * * * to the extent of Seventy-Five cars, upon the terms and conditions hereafter set forth. Fourth: Grower agrees to grow and harvest said crop in a proper and husband-like manner * * * Fifth: Grower agrees to deliver all of said crop to Company F. O. B. Cars at field * * * Sixth: The Company agrees to use its best efforts to sell said crop at Los Angeles Market for the best obtainable prices. Seventh: Company reserves the right to reject any or all crops which in its judgment are not in proper condition for marketing. Eighth: Grower agrees to repay to Company the sum of \$5,000.00 advanced to the Grower by Company, with interest thereon at the rate of 6½ per cent per annum from date hereof until paid. Ninth: It is understood and agreed between the parties hereto that the aforesaid advance

made by the Company shall be deducted from the proceeds derived from selling said crop of celery in car lots at each sale made by the Company for the account of Grower until the entire amount of advancement with interest thereon shall have been fully paid. It is understood, however, the above deduction to be made from each car lot shall not exceed the sum of One Hundred (\$100.00) Dollars."

[1,2] The relationship of joint adventurers is similar to that of partners. An essential element is that the parties share in the profits and losses. See 14 Cal. Jur. 759 et seq.; Nowell v. Oswald, 96 Cal. App. 536, 274 P. 423. In Dempsey-Kearns Theatrical & Motion Picture Enterprises v. Pantages, 91 Cal. App. 677, 267 P. 550, 552, a case which was denied a hearing by the Supreme Court, it is said: "It is, however, held without dispute that, in order to bring a contract within the legal designation of a copartnership or a joint enterprise, it must appear that the parties thereto are associated together for the joint benefit of all; that they are joint owners of the property belonging to the association, and share jointly in the profits as well as in the same proportion bear the losses that might result from the enterprise." Obviously, there is no such relationship created by the contract before us.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 197

JOHNSON et al. v. BUCK et al.
Civ. 5277.

District Court of Appeal, Third District,
California.
May 27, 1935.

1. Boundaries ⇨48(2)

Mere acquiescence in existence of a fence and occupancy of land up to it do not amount to an agreement that it was on accepted boundary line.

2. Boundaries ⇨37(5)

In action to quiet title to strip of land in dispute between adjoining lot owners, evi-

dence of plaintiffs' grantor that defendant told him fence between lots was not on correct line, that line should be surveyed and that line was on defendant's land, held to show no such uncertainty as to location of true boundary as would permit valid agreement as to location thereof.

3. Boundaries ⇨46(1)

Formal agreement to fix a boundary line is void if parties know or one of them knows that the agreed line is not true line.

4. Boundaries ⇨46(1)

Boundary is considered definite and certain when by survey it can be made certain from the deed.

5. Adverse possession ⇨71(1)

In action to quiet title to strip of land in dispute between adjoining lot owners where finding that there was agreement that existing fence constituted true boundary could not be sustained, plaintiffs could not claim benefit of color of title, since deed to property did not include disputed strip (Code Civ. Proc. § 325).

6. Adverse possession ⇨71(1)

A deed is color of title only as to land actually described by it.

7. Adverse possession ⇨94

In action to quiet title to strip of land between adjoining lots, payment of taxes by plaintiff on land described in deed held not payment of taxes on disputed strip, in absence of agreement extending boundary to include such strip.

8. Boundaries ⇨47(1)

In action to quiet title to strip of land between adjoining lots, defendant who had done nothing to establish boundary line and did not agree to location of fence thereon held not estopped to question boundary.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Louis Z. Johnson and others against W. A. Buck and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

A. G. Ritter and Charles W. Hackler, both of Los Angeles, for appellants.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for respondents.

PAULSEN, Justice pro tem. delivered the opinion of the court.

This action to quiet title involves a strip of land approximately 15 inches in width

and 891.84 feet in length, and was brought for the purpose of determining the location of a boundary line. Defendants appeal from a judgment rendered in favor of plaintiffs.

Respondents are the owners of the south half of the north half of lot 30 of Arcadia Acreage tract in the city of Arcadia, and appellants are the owners of the northerly 77.25 feet of the south half of the same lot. Santa Anita avenue, which runs north and south, forms the west boundary of the lot. The boundary in dispute is the east and west line between the two holdings. For more than five years immediately preceding the commencement of the action, a steel wire fence extended from Santa Anita avenue eastward across said lot for a distance of about 135 feet. The east end of this fence is 757 feet from the east end of the lot, and part of the time here involved there was no fence on this section of the line. However, there was testimony to the effect that a number of old survey stakes continued on the same course as the wire fence from its east end to the east end of the lot, and that for some time, as hereinafter stated, another fence had been erected between the same points. Respondents claim that the wire fence and the stakes were located on the true line, while appellants assert that they encroached 15 inches upon their property.

The court found that respondents were the owners of the south half of the north half of said lot, and that for more than five years preceding the commencement of the action the parties and their predecessors in interest had agreed that the wire fence and the line continuing it eastward should mark and forever determine the true boundary line between the properties. It further found that "for a period of more than five years prior to the filing of the complaint in the above entitled action, said fence had stood as erected, openly and with the knowledge and consent of defendants and their predecessors in interest"; that for the said time they had "paid all taxes duly and regularly assessed against said property and were in possession of, and lived upon said property during all of said time and improved said property, openly and with the knowledge of said defendants and their predecessors in interest." Appellants contend that these findings are not supported by the evidence.

Two surveyors, called by appellants, testified that this fence was located 15 inches

south of the correct line, and the court appears to have accepted this as true. It is not seriously contended that there was a formal agreement, either written or oral, to accept the site of the fence as a boundary line. It seems to have been the theory of the trial court, and it is now the contention of respondents, that there was an implied agreement established by long-continued acquiescence or by estoppel. With this we cannot agree.

[1-4] The wire fence was built while one Williams was the owner of the property now held by respondents. The record does not disclose how it came to be erected or under what circumstances its location was determined. In March, 1926, Williams conveyed the property to Teklar Floreen who owned it for six years. Floreen testified: "Q. And did you ever have any discussion with the people who lived on the property just to the south of you, concerning that fence? A. Some few months after I moved in Mr. Buck spoke to me and said something like this—that the property line wasn't in the proper place and they should have a survey of some kind, and they thought that we were over on his side a little." He further testified that the matter was never discussed again. Floreen conveyed the property to respondents in March, 1932. Appellants maintained throughout the trial that they had at all times refused to recognize the site of the wire fence as the accepted or true boundary line, and there is no other evidence as to the conduct of appellants or as to their relations with respondents thereafter. It was shown that about April, 1926, Floreen had erected a fence connecting the east end of the wire fence with the east end of the lot, and had removed it again a few months before he sold to respondents in 1932. There was also evidence that a house was built somewhere on the property shortly before Floreen acquired it; that this was occupied by him and later by respondents. It does not appear, however, that any improvements were constructed on the strip of land in dispute, or that respondents or their predecessors in interest were misled in any way by the failure of appellants to protest against the location of the wire fence.

Respondents rely upon the cases of *Buris v. Fitch*, 76 Cal. 395, 398, 18 P. 864, *Columbet v. Pacheco*, 48 Cal. 395, and *Sneed v. Osborn*, 25 Cal. 619, as authority for the proposition that appellants' silence amounted to such acquiescence as to

constitute an implied agreement to accept the fence site as the true boundary. These and other early decisions in this state undoubtedly lend some support to such contention, but more recent decisions have declared that mere acquiescence in the existence of a fence and occupancy of the land up to it do not amount to an agreement that it was on an accepted boundary line. *Dauberman v. Grant*, 198 Cal. 586, 246 P. 319, 48 A. L. R. 1244; *Staniford v. Trombly*, 181 Cal. 372, 186 P. 599, 601; *Phelan v. Drescher*, 92 Cal. App. 393, 268 P. 465, 467; *Ross v. Burkhard Investment Co.*, 90 Cal. App. 201, 265 P. 982. In *Phelan v. Drescher*, *supra*, after reviewing both the early and late authorities, the court states: "That, in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the time prescribed by the statute of limitations; it must go farther, and show that the boundary line was uncertain, or believed by all parties to be uncertain, and that the conterminous owners agreed among themselves to fix and establish the dividing line, and that they actually did designate said agreed line upon the ground." It is true that in *Raney v. Merritt*, 73 Cal. App. 244, 238 P. 767, and *Board of Trustees v. Miller*, 54 Cal. App. 102, 201 P. 952, there are expressions of the court which, if taken from the context and considered without reference to the facts of those cases, might lead to the conclusion that, in the absence of other evidence, acquiescence alone would be sufficient evidence of an implied agreement; but it is to be observed that in both of those cases there was evidence of uncertainty as to the true line, and there was also other conduct of the parties considered by the court. The real effect of those decisions is simply to declare again the well-established rule that acquiescence is evidence of an implied agreement, not that it alone can constitute sufficient proof of the fact. In *Hill v. Schumacher*, 45 Cal. App. 362, 187 P. 437, 438, where the facts closely parallel those of the instant case, it was said: "The existence of the fence alone must furnish the basis for the finding if such a finding is to be made, for there is no evidence that the parties ever considered the fence to be the line; no evidence that it was built as such; no evidence that the lot of appellant was used up to the line or that the strip in dispute was used by him at all, except in a purely nominal manner, growing out of

the occupation of his lot by a residence building which only covered a portion of the lot and did not impinge upon the part thereof in dispute." The finding as to agreed boundary was held to be unsupported by the evidence.

There was no actual or believed uncertainty such as would permit a valid agreement in the present case. Floreen's testimony shows clearly that appellant Buck knew that the wire fence was south of the true line, and desired a survey to fix it. "A formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line." *Clapp v. Churchill*, 164 Cal. 741, 130 P. 1061, 1062. "The boundary is considered definite and certain when by survey it can be made certain from the deed." *Hill v. Schumacher*, *supra*; *Janke v. McMahon*, 21 Cal. App. 781, 133 P. 21, 24.

[5, 6] Appellants also argue that the evidence is insufficient to support the findings as to adverse possession. It was respondents' theory that there had been an agreement as to the boundary line; that the fence therefore determined the new line, and they held the strip in dispute under color of title. But as the finding as to such an agreement cannot be sustained, they can no longer claim the benefit of color of title. Their deed to the property did not include the disputed strip, and a deed is color of title only as to the land actually described by it. In *re Wasson*, 54 Cal. App. 269, 201 P. 793; *Phelan v. Drescher*, *supra*. However, while the evidence is not as clear on this point as might be desired, it appears that the fence erected by Floreen, and the wire fence, existed for more than five years, and constituted an inclosure within the meaning of section 325 of the Code of Civil Procedure.

[7] The finding as to payment of taxes depends for support upon the finding as to agreed boundary, and must fall with it. The evidence shows clearly that the taxes were paid upon the land described in respondents' deed, which did not include the strip in dispute, and in the absence of an agreement extending the boundary to include this strip, this does not constitute a payment of taxes on such strip. *Staniford v. Trombly*, *supra*; *Phelan v. Drescher*, *supra*; *Board of Trustees v. Miller*, *supra*.

[8] Finally, respondents argue that appellants are estopped to deny the existence of the agreement, but we are unable to perceive any elements of estoppel in this case. In 1926, Buck stated that he did not recognize the site of the wire fence as the correct boundary line. His testimony and that of his witnesses was to the effect that he continued to protest thereafter, but respondents contend that he was entirely silent regarding the transaction. Having done nothing to establish the line, or agree to the location of the fence, appellants are not estopped to question it. *Phelan v. Drescher*, supra; *Dibirt v. Bopp* (Cal. App.) 41 P.(2d) 174. In disposing of the same contention in *Staniford v. Trombly*, supra, the court said: "There was an absence of the essential elements of estoppel, namely, false statements or concealments, or conduct amounting to false statements or concealments, with reference to the boundary made by one having knowledge, actual or virtual, of the facts, to one ignorant of the truth with the intention, resulting in consummation, that he should act upon such false statements or concealments or equivalent conduct."

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



7 Cal.App.2d 484

OLINGER et al. v. PACIFIC GREYHOUND LINES.

Civ. 1179.

District Court of Appeal, Fourth District,
California.

June 8, 1935.

Hearing Denied by Supreme Court
Aug. 6, 1935.

1. Carriers ⇨321(21)

Instructions throwing burden on bus company to prove want of negligence in action for injuries to passenger *held* erroneous.

2. New trial ⇨41(3)

Constitutional provisions declaring that new trial shall not be granted on ground of misdirection of jury unless error complained of has resulted in miscarriage of justice are as binding on trial judge as on appellate court (Const. art. 6, § 4½).

3. Appeal and error ⇨933(5)

Reviewing court must assume that trial judge in granting new trial examined entire cause, including evidence, and concluded that errors resulted in miscarriage of justice, and in so doing he was required to consider witnesses' credibility, their manner of testifying, and weight and sufficiency of evidence (Const. art. 6, § 4½).

4. New trial ⇨157

Trial judge, in passing on motion for new trial, must review cause a second time as trier of fact (Const. art. 6, § 4½).

5. Appeal and error ⇨977(3)

New trial ⇨6

Trial judges are given wide latitude in exercising sound discretion in passing on motions for new trial, and order granting motion will not be disturbed on appeal, unless there has been abuse of such discretion (Const. art. 6, § 4½).

6. New trial ⇨39

Granting new trial to bus company which was sued for injuries to passenger who was alleged to have been struck by bag falling from baggage rack, on ground of error in instructions that bus company must prove want of negligence by preponderance of evidence, *held* not error, where evidence was conflicting (Const. art. 6, § 4½).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Annie Olinger and another against the Pacific Greyhound Lines. Verdict for plaintiffs, and, from an order granting a new trial, plaintiffs appeal.

Affirmed.

Clifford C. Pease, of San Diego, and John B. Molenaar, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order granting a new trial in an action to recover damages for personal injuries suffered by Annie Olinger, wife of W. E. Olinger, while she was a passenger for hire on a bus operated by defendant, a common carrier. The jury returned a verdict in favor of plaintiffs in the sum of \$5,000. The motion for new trial was granted particularly because of two erroneous instructions given to the jury at the request of plaintiffs.

Counsel for plaintiffs tacitly admit error in these instructions, but urge they were not prejudicial because the same subject-matter was correctly covered in other instructions so the jury could not have been misled by them. They also urge that, assuming that the instructions were erroneous and misleading, the motion for new trial should not have been granted because of the provisions of § 4½ of article 6 of the Constitution. They argue that under all the evidence in the record an honest jury could only return a verdict for plaintiffs. They urge that the evidence presents no conflicts and contains nothing that could support any defense.

[1] The erroneous instructions given by the court are as follows: "The plaintiff makes out a prima facie case against the carrier when he shows that any injury was proximately cause by some accident, while being so transported by the defendant. Such proof raises a legal presumption of negligence on the part of the carrier as to the management and operation of its bus, and the burden is then thrown upon the defendant to show by a preponderance of the evidence that any injury sustained by plaintiff was without negligence on its part.

"If you find that the plaintiff was injured while a passenger on the bus of defendant, you are then further instructed that by such fact, it is the duty of the defendant bus company to prove by a preponderance of evidence that it was not negligent in the operation of said bus, either directly or through its agents, or through any appliance or equipment, or through any instrumentality under its control, and it must prove that it was not negligent in using and exercising therein a care as is required by law and described to you in some other instructions."

In the case of *Valente v. Sierra Railway Co.*, 151 Cal. 534, 91 P. 481, 483, instructions very similar to the two which we have quoted were held prejudicially erroneous by the Supreme Court and a judgment in favor of plaintiffs was reversed because of them. It was there said: "In *Cody v. Market Street Ry. Co.*, 148 Cal. 90, 82 P. 666, a passenger carrier case, it was held that an instruction to the effect that the presumption of negligence arising from proof of the accident and consequent injury threw upon the carrier the burden of showing want of negligence did not require the carrier to show want of negligence by a preponderance of evidence, but only to make such showing 'as will leave the jury, with all the

evidence before it, unsatisfied as to whether there was negligence on defendant's part.' It was also there declared that, in such a case, it was necessary for the plaintiff to prove negligence by a preponderance of evidence. In *Patterson v. San Francisco, etc., Co.*, 147 Cal. 178, 81 P. 531, also a passenger carrier case, the questions here involved were exhaustively discussed. It was held that instructions to the effect that, on the issue of negligence the plaintiff has the affirmative of the issue and must prove such negligence by a preponderance of evidence, and that any presumption arising from the accident need not be overcome by a preponderance of evidence, and that, if the railroad company introduce 'sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome,' were correct. See, also, *Kay v. Metropolitan, etc., Co.*, 163 N. Y. 447, 57 N. E. 751."

[2-5] We should call attention to section 3 of rule 8 of Rules for the Supreme Court and District Courts of Appeal which contains the following: "Where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief." Section 4 of the same rule provides, in part, as follows: "For any failure to observe this rule the court may, of its own motion * * * dismiss the appeal. * * *" Plaintiffs have printed the two questioned instructions in their briefs, but have failed to print in full any of the other instructions bearing upon the same subject which they maintain cure the error. We have examined all of the instructions given at the request of plaintiff, and find several we cannot commend besides the two we have quoted. The best that can be said of the instructions given is that they are conflicting and might tend to confuse the minds of the jurors. Several of the instructions, in addition to those quoted, should not be given in their present form upon another trial of the cause.

Plaintiffs contend that the trial court erred in granting the motion for new trial because the order violated those provisions of section 4½ of article 6 of the Constitution, which provide as follows: "No * * * new trial shall be granted in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Of course, these pro-

visions are as binding on the trial judge as on the members of an appellate court. This being so, we must assume that the trial judge in granting the motion for new trial performed his duty, examined the entire cause, including the evidence, and concluded that the errors resulted in a miscarriage of justice. In so doing he was required to consider the credibility of the witnesses, their manner of testifying on the stand, and the weight and sufficiency of the evidence. While the trial judge should not lightly set aside a judgment, still it is his duty in passing on a motion for new trial to review the cause a second time as a trier of fact and after such review decide the motion. Trial judges are given a wide latitude in exercising a sound discretion in passing on motions for new trial, and an order granting such a motion will not be disturbed on appeal unless there has been an abuse of such discretion. *Preluzsky v. Rittigstein*, 51 Cal. App. 427, 196 P. 917.

[6] The trial judge did not specify the insufficiency of the evidence to support the verdict and judgment as one of the grounds for granting the motion. This eliminates this question from direct consideration on appeal. However, since the adoption of section 4½ of article 6 of the Constitution, it cannot be entirely eliminated either by the trial judge in passing on the motion or by the appellate court on appeal from an order granting the motion, for that section requires "an examination of the entire cause, including the evidence," by both courts in order to determine the prejudicial effect of any of the technical errors there specified. In the instant case, the plaintiffs have placed the duty of considering the evidence squarely before us by contending that the technical errors could not have been prejudicial because under all of the evidence but one verdict could have been returned, and that for the plaintiff. They maintain there is no evidence in the record which would support a judgment for defendant. Under these circumstances, we are required to consider the evidence.

Defendant was a common carrier of passengers for hire. Plaintiffs were passengers for hire traveling from Washington, D. C., to California. Seats in the bus were arranged along both of its sides with a narrow aisle down the center. Two metal racks for the hand baggage of passengers were provided, one on each side of the bus over the seats. These racks had an outside vertical rail 4½ inches high and an elastic rope

about 2 or 2½ inches above the upper edge of the railing.

The bus was halted at the eastern boundary of California and a rigid inspection of all baggage was had. After the inspection, the hand baggage was returned to the racks. None of it protruded over or rested on the guard rail of the racks. About 25 miles west of Yuma a Gladstone bag about 9 inches thick, 12 inches high and between 24 and 30 inches long fell from one of the racks to the floor of the bus. Plaintiffs maintain that it struck Mrs. Olinger during this fall, and injured her. Defendant maintains that it did not touch Mrs. Olinger during the fall, but left the rack several feet back of Mrs. Olinger and descended directly to the floor of the bus, in its downward course brushing the arm of a Mrs. Adams who was sitting two seats back of Mrs. Olinger. There is evidence in the record supporting both of these theories. Mrs. Adams testified that a man occupying the seat behind her reached up to the rack and pulled out from it a knee-length army overcoat, and that the Gladstone bag followed the overcoat from the rack. The bag came to rest on the floor about five feet back from where Mrs. Olinger was sitting. A physician examined Mrs. Olinger a short time after bag fell from the rack. He found no physical evidence of her having been struck by the bag nor did she then, according to his testimony, exhibit any symptoms of shock.

We are of the opinion that the evidence presented a sharp conflict that was directed to the trier of fact for determination; first, to the jury at the termination of the trial, and, second, to the trial judge upon the motion for new trial. Under the circumstances, he might well have found, as he impliedly did in granting the motion, that when he erroneously told the jury that defendant must prove by a preponderance of the evidence that neither it nor its agent, themselves, or through any appliance, equipment, or instrumentality under its control, were negligent, he placed a burden on defendant not justified by law which resulted in a verdict for plaintiffs. Under these circumstances, we cannot conclude that the trial judge abused his discretion in granting the motion for new trial.

The order granting a new trial is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

7 Cal.App.2d 641

in re MAXWELL'S ESTATE.

Civ. 10250.

District Court of Appeal, Second District,
Division 1, California.

June 17, 1935.

1. Husband and wife ⇨14(4)

Where husband and wife owned real property as tenants in common, husband's undivided half-interest in property was his separate property (Civ. Code, §§ 682, 685, 686).

2. Executors and administrators ⇨175

Right to probate homestead is favored by law and should be liberally construed (Probate Code, § 661).

3. Executors and administrators ⇨181

For purpose of setting aside probate homestead, community property should first be resorted to, and, if none appropriate for that purpose, then property held in common, and, if none appropriate for that purpose, then decedent's separate property (Probate Code, § 661).

4. Executors and administrators ⇨194(6)

Where property out of which probate homestead was carved was deceased husband's separate property, order limiting probate homestead to widow's life held proper (Probate Code, § 661).

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the estate of Thomas W. Maxwell, deceased. Petition by surviving widow to have set aside to her a probate homestead. From an order granting probate homestead to widow for life, widow appeals.

Affirmed.

D. K. Gault, of Los Angeles, for appellant.

Conroy & Conroy, of Hollywood, for respondent.

ROTH, Justice pro tem.

On petition by the surviving widow to have set aside to her a probate homestead out of the real property owned by herself and her deceased husband as tenants in common, no homestead having been claimed or selected by either spouse prior to the death of the husband, the court granted the petition and set aside to the petitioning widow the homestead request-

ed, but limited the same to her lifetime. She contends that the court under the provisions of section 661 of the Probate Code *was required* to set aside such homestead in fee.

[1] There is no contention that the property from which the homestead was carved is, or ever was, community property. It is settled, therefore, that the decedent's undivided one-half interest in the property owned in common with his wife, and to which property the petition was directed, was his separate property. Civ. Code, §§ 685, 686, and 682; *Siberell v. Siberell*, 214 Cal. 767, 7 P.(2d) 1003.

[2-4] Although the right to a probate homestead is favored by law and should be liberally construed (In re Estate of Myers, 115 Cal. App. 443, 1 P.(2d) 1013; In re Estate of Whitney, 171 Cal. 750, 154 P. 855), we have been cited to no authority and know of none which holds that separate property must be set aside as a probate homestead without limitation. Section 661 of the Probate Code does not so provide, but in our opinion enacts to the contrary. The pertinent portion of said section reads: " * * * The court * * * must select * * * out of the community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property and no such property owned in common, then out of the separate property of the decedent. *If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period*, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration." (Italics ours.)

The reference in the excerpted portion of the section to three classes of property is, in our opinion, for the purpose of designating the order in which the court must resort to property for the purpose of setting aside a homestead, i. e., first, to the community property, and, if there be none appropriate for that purpose, then to the property held in common, and, if there be none appropriate for that purpose, then to decedent's separate property. The statute itself then provides that, if the homestead be set aside out of separate proper-

ty, "the court can set it apart only for a limited period."

The order is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 623

TITLE INS. & TRUST CO. v. KINKEL et al.
Civ. 9815.

District Court of Appeal, Second District,
Division 2, California.
June 14, 1935.

1. Mortgages ⇨561

Statute relating to appointment of appraisers in action for deficiency judgment *held* inapplicable to trust deed executed prior to effective date of statute (Code Civ. Proc. § 580a, as added by St. 1933, p. 1672, § 4).

2. Mortgages ⇨561

Statute relating to appointment of appraisers in action for deficiency judgment *held* inapplicable to power of sale contained in trust deed and exercised prior to effective date of statute (Code Civ. Proc. § 580a, as added by St. 1933, p. 1672, § 4).

3. Mortgages ⇨561

Statute relating to appointment of appraisers in action for deficiency judgment *held* inapplicable to action for deficiency judgment instituted prior to effective date of statute (Code Civ. Proc. § 580a, as added by St. 1933, p. 1672, § 4).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Title Insurance & Trust Company against A. R. Kinkel and another. From the judgment, defendants appeal.

Affirmed.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for appellants.

Bob Wheeler, of Glendale, for respondent.

CRAIL, Justice.

[1-3] The questions raised on this appeal are these: Does section 580a of the Code of Civil Procedure, as added by St. 1933, p.

1672, § 4, relating to the appointment of appraisers in actions for a deficiency judgment, apply (1) to a trust deed executed prior to its effective date, (2) to a power of sale therein contained and exercised prior to its effective date, and (3) to an action for a deficiency judgment thereunder instituted prior to its effective date?

The reasoning in *Bennett v. Superior Court* (Cal. App.) 42 P.(2d) 80, leads inevitably to a negative answer to all of these questions.

Judgment affirmed.

I concur: STEPHENS, P. J.



7 Cal.App.2d 406

PEOPLE v. CUMMINGS.
Cr. 2712.

District Court of Appeal, Second District,
Division 2, California.
June 6, 1935.

1. Criminal law ⇨1036(1), 1044

In prosecution for driving while intoxicated, defendant could not object, on appeal, to arresting officer's testimony relative to defendant's statements to show that defendant admitted he was intoxicated when arrested, where no objection was made thereto in trial court and no motion to strike was made.

2. Criminal law ⇨406(3)

Statement made by motorist that he was intoxicated at time of arrest *held* admissible, regardless of whether voluntarily made, where statement was not confession.

3. Criminal law ⇨730(3)

In prosecution for driving while intoxicated, that prosecutor asked defendant whether he had not been previously arrested for a drunken driving charge and that charge was reduced, *held* not reversible error, where question was asked only once on cross-examination, there was no showing justifying claim that prosecutor knew defendant had never been convicted of such charge, and objection to question was sustained and jury instructed to disregard it.

4. Criminal law ⇨824(8)

In prosecution for driving while intoxicated, failure to instruct that oral admissions are to be viewed with caution *held* not

error, where instruction was not requested by defendant.

5. Criminal law — 797

In prosecution for driving while intoxicated, instruction that jury's recommendation, provided by statute, should go no further than to recommend that punishment should be by imprisonment or by fine and that length of imprisonment or amount of fine were not matters subject to recommendation held not error, where jury recommended minimum sentence and court sentenced defendant to minimum term (St. 1929, p. 537, § 112).

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

W. W. Cummings was convicted of operating a motor vehicle while under the influence of intoxicating liquor, and he appeals.

Affirmed.

Charles W. Ostrom and John Henderson Pelletier, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Justice.

This is an appeal from a conviction under section 112, California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537), of operating a motor vehicle while under the influence of intoxicating liquor.

[1,2] It is the first contention of the defendant that the court erred in admitting testimony by the arresting officer relative "to oral statements made by the defendant on interrogation in the District Attorney's office after his arrest at a time when only the officials were present, defendant not being represented by counsel, to show that the defendant answered 'yes' on interrogation as to whether he was intoxicated the night before when arrested." No objection was made in the trial court to the introduction of such testimony, and no motion was made to strike it. The objection cannot be raised for the first time on appeal. There was a conflict in the evidence concerning whether or not the statements were voluntary. The statement of defendant that he was intoxicated when arrested is not a confession, but merely an admission (People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Luzovich,

127 Cal. App. 465, 16 P.(2d) 144), and hence was admissible regardless of whether it was free and voluntary (People v. Gonzales, 72 Cal. App. 626, 237 P. 812; People v. Baker, 94 Cal. App. 628, 271 P. 765; People v. Shannon, 203 Cal. 139, 263 P. 522). We find no error here.

[3] The defendant next contends that "the District Attorney was guilty of flagrant misconduct in persistently asking the defendant 'were you not previously arrested for a drunken driving charge and it was reduced?' the District Attorney well knowing that the defendant had never been convicted of a drunken driving charge. * * *" The question was only asked once and then only in cross-examination of defendant's statement on direct examination that he did not know the offense was a felony. There is no showing which would justify appellant's claim that the district attorney well knew the defendant had never been convicted of such a charge. Defendant's objection to the question was sustained by the court, and the jury was instructed to disregard all discussion of the same. We see no merit in this contention.

[4] The defendant contends that the court erred in failing to instruct the jury that the evidence of the oral admissions of a party are to be viewed with caution. Such an instruction was not asked by the defendant. It was not the court's duty to give such an instruction unless requested by the defendant. See 8 Cal. Jur. 309, §§ 362 and 363.

[5] Section 112 of said act provides: "Upon every verdict of 'guilty' under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury." The defendant contends that the court erred in instructing the jury to the effect that its recommendation, however, should go no further than to recommend that punishment be by imprisonment in the county jail or state prison or that the punishment should be in the form of the imposition of a fine, and that the length of the imprisonment or the amount of the fine were matters which could not be the subject of recommendation by the jury. The jury recommended that defendant "be punished by imprisonment in the county jail for not less than 90 days nor more than one year." The court in its sen-

tence fixed the length of the imprisonment in the county jail at the minimum provided by the statute which was also the minimum recommended by the jury. For a case somewhat similar, see *People v. Ray*, 92 Cal. App. 417, 268 P. 382. We see no merit in this contention.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 280

**PACIFIC STATES SAVINGS & LOAN CO.
v. STOWELL**
Civ. 10052.

District Court of Appeal, Second District,
Division 2, California.
May 31, 1935.

As Amended June 14, 1935.

1. Guaranty ⇨14

Oral agreement to guarantee an indebtedness, followed by execution of written guaranty, is valid where oral agreement was contemporaneous with and part of loan transaction, independent consideration to support the guaranty being unnecessary in such case (Civ. Code, § 2792).

2. Guaranty ⇨16(3)

Where making and delivery of trust deed note, the transfer of consideration from lender to borrower and the guaranty constituted one transaction, guaranty *held* supported by consideration and was valid, though guaranty was not signed until after execution of note and passing of money from lender to borrower (Civ. Code, § 2792).

3. Corporations ⇨432(12)

Evidence *held* sufficient to show that general manager soliciting loans for corporation was acting as president's agent in orally agreeing that president would guarantee the note, and to show further that agreement to guarantee was part of consideration for the loan, and that president, by his act in subsequently signing the guaranty, ratified and adopted his agent's promise.

4. Principal and agent ⇨23(2)

Agency may be proved by circumstantial evidence.

5. Evidence ⇨237

When agency is proved, statements of agent are admissible against principal.

6. Stipulations ⇨14(10)

In action on guaranty of note given to building and loan association and assigned to plaintiff, another building and loan association, stipulation that note, trust deed, and guaranty were transferred by payee to plaintiff *held* sufficient to sustain finding to that effect, and rendered further evidence unnecessary to show compliance with Code section respecting consolidation of such associations (Civ. Code, § 647a).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Pacific States Savings & Loan Company against N. W. Stowell. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals.

Appeal from the order dismissed. Judgment affirmed.

Davis & Thorne, of Los Angeles, for appellant.

John L. Mace, of Los Angeles (Roy D. Reese, of Los Angeles, of counsel), for respondent.

WILSON, Justice pro tem.

This appeal is from a judgment in favor of plaintiff upon a guaranty executed by defendant. Plaintiff's assignor, Fidelity Savings & Loan Association, made a loan to a corporation, taking a note therefor secured by a trust deed upon real property. Defendant was president of the corporation borrowing the money. The Fidelity Company refused to make the loan unless defendant would guarantee payment thereof, which defendant, through an agent, agreed to do. The guaranty was not signed until after the execution of the note and the passing of the money from the lender to the borrower. Thereafter the Fidelity Company assigned the note, trust deed, and guaranty to plaintiff. After default in payment, the property was sold, bringing an insufficient amount to satisfy the indebtedness. Thereupon this action to recover the deficiency was brought against the guarantor.

[1,2] A guaranty of an antecedent debt of another must be supported by a consid-

eration distinct from the original obligation (Civil Code, § 2792), but an oral agreement to guarantee an indebtedness, followed by the execution of a written guaranty, is valid. *Kinney v. Jos. Herspring & Co.*, 53 Cal. App. 628, 200 P. 737. Where, as here, the making and delivery of the note, the transfer of the consideration from lender to borrower and the guaranty constituted one transaction, the consideration of the one promise supports the other, and the guaranty is valid, even though the guaranty was not signed coincidentally with the signing of the note and the passing of the funds to the borrower. *Howland v. Aitch*, 38 Cal. 133.

[3-5] Defendant contends that there was no agreement to guarantee the note on his part antecedently to or concurrently with the signing of the note or the making of the loan. There was no direct evidence to that effect, but there was sufficient circumstantial evidence. One Warner, general manager of the corporation which borrowed the money, made application to the Fidelity Company for the loan. He was told that the loan would not be made without the defendant's guaranty, and he said that the defendant told him to say that he, defendant, would guarantee the loan. Defendant was president of the corporation and as such he signed the note and trust deed. He testified that he owned no stock whatever in the corporation, but within one month after the date of the note he gave a financial statement to a national bank stating that he owned stock therein to the amount of \$1,500,000. At the urgent request of Warner, the money was paid by the Fidelity Company before the guaranty was signed, Warner stating that the defendant was absent from the city and that he would sign upon his return. When subsequently, an agent of the Fidelity Company presented the note to him, he, without hesitation, signed the guaranty, which bore the same date as the note, making no denial of his responsibility. The evidence was sufficient to establish the fact that Warner was acting as the defendant's agent in orally agreeing that the defendant would guarantee the note, that the agreement to guarantee was a part of the consideration for the loan, and that the defendant, by his acts, ratified and adopted his agent's promise. Agency may be proved by circumstantial evidence (*Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 P. 738), and, when

proved, the statements of the agent are admissible against his principal.

[6] Both the Fidelity Company and plaintiff were building and loan associations. A stipulation at the trial that the note, trust deed, and guaranty were transferred by the Fidelity Company to the plaintiff was sufficient to sustain the finding to that effect, and rendered further evidence unnecessary to show compliance with section 647a of the Civil Code as it read at the date of the transfer.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 646

**ROBBINS v. HENRY COWELL LIME &
CEMENT CO.**
Civ. 9710.

District Court of Appeal, First District,
Division 1, California.

June 18, 1935.

Rehearing Denied July 18, 1935.

Hearing Denied by Supreme Court
Aug. 16, 1935.

1. Negligence ☞134(11)

In truck driver's action for injuries sustained when he was struck by sack of cement while loading cement from chute into truck with assistance of defendant's employees, evidence held to show that failure of employee at bottom of chute to warn employee at top of chute to send no more sacks until accumulated sacks had been removed was proximate cause of injury.

2. Negligence ☞121(3)

Where truck driver, loading sacks of cement from chute into truck with assistance of defendant's employees, who were in charge of chute, was injured by sack of cement which employee failed to catch, and defendant offered no evidence to account for accident, *res ipsa loquitur* applied.

3. Negligence ☞135

In truck driver's action for injuries sustained when he was struck by sack of cement while loading cement from chute into truck with assistance of defendant's employees, evidence held to support finding that plaintiff

was not guilty of contributory negligence barring recovery.

4. Damages $\S$ 132(6)

\$4,000 held not excessive where plaintiff sustained double fracture of ankle, fracture of tibia and fibula, was confined for nine weeks, and four years after injury suffered pain and was unable to do work performed before injury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Harvey Robbins against the Henry Cowell Lime & Cement Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hatch, Mahl, Mickle & Haizlip, of San Francisco, for appellant.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for respondent.

PER CURIAM.

This is an action for damages for injuries sustained by plaintiff through the alleged negligence of defendant's employees. The action was tried by the court without a jury and judgment was rendered for plaintiff for the sum of \$4,000. Defendant moved for a new trial and, same being denied, prosecutes this appeal.

Three grounds for reversal are urged by appellant: (1) Failure of the evidence to show that appellant was negligent; (2) that respondent was guilty of contributory negligence; (3) excessive damages.

[1] Respondent was a truck driver in the employment of a feed and fuel company. On August 12, 1930, he was directed by his employer to go to the warehouse of appellant to get 100 sacks of cement and load them on his truck. Respondent drove his truck to appellant's warehouse and was directed by an employee of appellant to drive his truck under a chute, and he was told where to stop the truck. The chute was a wooden structure about 30 feet long and 3 feet wide, with sides on it, leading from the second story of the warehouse to within 3½ feet of the truck body parked under it. It sloped at an angle of 45 degrees. When respondent attempted to drive under the chute, he observed a small truck parked under it which was being loaded and he watched until its loading

was completed. He then drove his truck under the chute. Two of appellant's employees were stationed on the chute to assist in loading the truck; one of them at the head of the chute on the second story, and the other at its lower end. After placing his truck under the chute as directed, respondent remained on his truck. The method of loading was that the man at the head of the chute threw the sacks, each of which weighed 100 pounds, into the chute and they were stopped at the lower end by the man stationed there; they were then taken from the end of the chute by respondent and loaded on the truck. Prior to the time respondent was injured, he had loaded upon the truck 80 or 90 sacks, and he had taken a sack from the end of the chute and was bending over placing it on his truck when the man on the second story threw a sack into the chute, which the man at the lower end of the chute failed to stop, and it bounded onto the truck and struck respondent and inflicted the injury. Appellant's employee at the lower end of the chute stopped the sacks with his foot as they came down, and had so stopped some 80 or 90 prior to the accident. The sack that struck respondent was not stopped by said employee, and his explanation for his failure to stop it was merely that he let it go. At the time this sack which struck respondent came down the chute, it appears that there had accumulated at the lower end 2 or 3 sacks. If this accumulation interfered to any extent with the efforts of the man below in stopping the sacks, it was plainly his duty to warn the man at the top to cease sending any more sacks down the chute until the accumulated sacks had been removed. He neglected to do this, and also failed to give any warning to respondent that the sack that struck him had not been stopped. From these facts, it clearly appears that it was the negligence of these two employees of appellant, or at least of the one at the lower end of the chute, that caused the injury to respondent.

[2] In addition, we have applicable to the facts of this case the doctrine of res ipsa loquitur to raise an inference of negligence. The allegations of negligence in the complaint are general. The accident was such that in the ordinary course of things it does not happen. Appellant offered no evidence. The chute was under the exclusive control of appellant, and

there is a total absence of explanation on the part of appellant to account for the accident. *Meyer v. Tobin*, 214 Cal. 135, 4 P.(2d) 542; *Merino v. Pacific Coast Borax Co.*, 124 Cal. App. 336, 12 P.(2d) 458; *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480.

[3] The trial court found that respondent was not guilty of contributory negligence and this finding is supported by the evidence.

[4] Appellant contends that the damages are excessive. The evidence shows that respondent sustained a double fracture of the right ankle, known as a Potts fracture; a fracture of both bones, the tibia and fibula; that by reason of the said injury he suffered pain and was confined for nine weeks; that at the time of the trial, nearly four years after the injury, he still suffered pain and was unable to perform the work he did before the injury; and that this condition is permanent. There is nothing indicating that the trial court, in fixing the amount of damages, was actuated by passion or prejudice or corruption.

The judgment is affirmed.



7 Cal.App.2d 246

BRIZZOLARI et al. v. MARKET ST. RY. CO.
Civ. 9429.

District Court of Appeal, First District,
Division 1, California.

May 29, 1935.

Rehearing Denied June 28, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

1. Carriers ⇐281

Carrier owes greater quantum of care to a child of tender years accepted by carrier as a passenger than carrier owes to an adult.

2. Appeal and error ⇐930(2)

On appeal from judgment against street railway company for injuries sustained by seven year old girl who slipped from rear platform of moving street car, reviewing court would assume, in view of instructions that jury could not return verdict for plaintiff if jury found that girl jumped or step-

ped from moving car, that girl's hand slipped and she fell.

3. Carriers ⇐320(25, 30)

In action for injuries sustained by seven year old girl who slipped from rear platform of moving street car, whether conductor was negligent in failing to stop at girl's alleged destination, and whether such negligence was proximate cause of injuries, *held* for jury.

4. Carriers ⇐321(21)

In action for injuries sustained by seven year old girl who slipped from rear platform of moving street car, instruction that in case of injury presumption *prima facie* is that injury occurred by negligence of carrier *held* erroneous, since, for doctrine of *res ipsa loquitur* to apply, it must also be shown that such injury was proximately caused by something done by carrier in operation of car.

5. Appeal and error ⇐1064(1)

In action for injuries sustained by seven year old girl who slipped from rear platform of moving street car, error in instructing that in case of injury presumption *prima facie* is that injury occurred by negligence of carrier *held* not prejudicial, where case went to jury on conflicting evidence which covered completely all circumstances surrounding accident, many instructions were explicitly directed to evidence, and jurors were repeatedly told not to find for plaintiffs unless they found defendant negligent from preponderance of evidence.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Mary Brizzolari, etc., and others against the Market Street Railway Company. From a judgment, defendant appeals. Affirmed.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellant.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for respondents.

DOOLING, Justice pro tem.

This is an appeal by defendant from a judgment for personal injuries following the verdict of a jury.

At the close of plaintiffs' case defendant moved for a nonsuit which was denied. The order denying this motion is assigned as error. This assignment and the second made in appellant's brief, that there is no evidence tending to show that defendant was guilty of any negligence which prox-

imately contributed to the accident in question, may appropriately be considered together. In so considering them we will follow the established practice of stating the evidence most favorable to respondents.

At the time of the accident involved herein Mary Brizzolari, the minor plaintiff, was seven years old. In company with a girl companion aged nine years, she boarded a street car operated by appellant at South Lomita Park to go to her home from school. She and her companion had books of commutation tickets which entitled them to ride beyond their destination, which was Millbrae Park. The two little girls each gave the conductor a ticket from these books and Mary told the conductor that they wished to get off at Millbrae Park. The children took seats in the rear compartment of the car and the conductor proceeded to collect fares from other passengers. As the car approached Millbrae Park Mary pressed the buzzer to signal the motorman to stop and the two children left their seats and went to the rear exit of the car. Mary was carrying a lunch basket and her school books in one hand. With the other she grasped the upright bar by the rear steps. The car did not stop or slacken speed and as it was passing Millbrae Park station Mary's hand slipped from the bar and she fell from the car and was injured.

[1] It is settled law that a carrier owes a greater quantum of care to a child of tender years accepted by it as a passenger than it would to an adult. 10 C. J. p. 898; 4 R. C. L. p. 1161. This is but a special application to carriers of the general rule of the law of negligence, recognized in California, and stated in 19 Cal. Jur. p. 623, in the following language: "As has been seen, a child of immature years is expected to exercise only such care and self-restraint as pertains to childhood. A reasonable person is expected to know this and to govern his actions accordingly, so that when a child liable to be injured cannot be expected to exercise the usual quantum of care, a greater amount of caution is necessary on the part of the one whose act might cause injury."

Many cases on the subject of the quantum of care owed by carriers to children riding on their conveyances are collected in a note in 28 A. L. R. at page 1035. They illustrate the application of the rule that a carrier must take greater care for the safety of small children than of other passengers to a wide variety of circumstances. In the recent case of *Shannon v. Central*

Gaither U. School Dist., 133 Cal. App. 124, 23 P.(2d) 769, 771, the court considered the liability of defendant to a ten year old boy who was a passenger in a school bus. The driver of the bus stopped the bus on the opposite side of the road from the boy's home and permitted the boy to alight there without warning him of the danger from oncoming automobiles. The boy ran heedlessly across the road and was struck by an automobile and injured. In affirming a judgment against the school district the court said: "It is ordinarily necessary to exercise greater care for the protection and safety of young children than for an adult person who possesses normal and mature faculties. One should anticipate thoughtlessness and impulsiveness in the conduct of a young child. In *Victory Sparkler & Specialty Co. v. Latimer* (C. C. A.) 53 F. (2d) 3, it is said: 'One dealing with children must anticipate ordinary behavior of children.'"

In at least four cases from other jurisdictions carriers have been held liable for injuries received by children in jumping from moving cars, in fright or excitement, as they were being negligently carried past their destinations. *Kruger v. Omaha, etc., R. Co.*, 80 Neb. 490, 114 N. W. 571, 17 L. R. A. (N. S.) 101, 127 Am. St. Rep. 786; *Avey v. Galveston, etc., Ry. Co.*, 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809; *Martin v. Southern Ry. Co.*, 77 S. C. 370, 58 S. E. 3, 122 Am. St. Rep. 574; *Hemingway v. Chicago, etc., Ry. Co.*, 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

[2] We need not go so far as the courts did in the four last-cited cases in order to sustain the judgment here, because in the case before us the trial court specifically instructed the jury that it could not return a verdict for plaintiffs if it found that the injured girl jumped or stepped from the moving car. We must assume in view of these instructions that the jury found, in accordance with her testimony, that her hand slipped and she fell. But these cases are in point on the questions of negligence and proximate cause. They proceed upon the theory that it is negligence for a carrier to pass the destination of a youthful passenger, without warning the child or taking any steps for its safety, and that since the employees of the carrier might reasonably foresee that a child would attempt to jump from the moving vehicle, under such circumstances their negligent conduct is the proximate cause of the resulting injury. This accords with the definition of "proxi-

mate cause" in *Katz v. Helbing*, 215 Cal. 449, 451, 10 P.(2d) 1001, 1002: "* * * the acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result therefrom."

[3] Under the facts of this case the jury might well conclude that as a man of ordinary prudence the conductor, after being advised by the little girls that they wished to alight at Millbrae Park, should have foreseen that they might approach the steps on nearing that station, and that if the car did not stop, in view of their extreme youth, one or both of them might fall from the car. Under such circumstances the jury would be entitled to find that in failing to stop the car as requested or to take any steps to protect the children as the car approached their station the carrier was guilty of negligence, and that such negligence was the proximate cause of the little girl's injuries.

The trial court gave the following instruction: "Carriers of passengers are liable for injuries caused from the slightest neglect of duty of the agents in charge of the carrier. Such agents are held to extraordinary diligence and care. In case of injury the presumption prima facie is that it occurred by the negligence of the carrier. The burden is on the carrier to overcome such prima facie showing and to show that the injury was sustained without any negligence on its part."

[4] It was error for the court to charge that "in case of injury the presumption prima facie is that it occurred by the negligence of the carrier." *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, 143 P. 718; *Graff v. United Railroads*, 178 Cal. 171, 172 P. 603; *Gray v. Los Angeles Ry. Corp.*, 69 Cal. App. 123, 230 P. 970. In order for the doctrine of *res ipsa loquitur* to apply, in addition to the injury to the passenger, it must be shown that such injury was proximately caused by something done by the carrier in the operation of the car. However, it remains to determine whether the error in giving such instruction was prejudicial under the facts of this case.

The case went to the jury on conflicting evidence which covered completely all the circumstances surrounding the accident. The important questions were: Did, or did not, the injured child tell the conductor that she wished to get off at Millbrae Park; did, or did not, she press the buzzer to signal the motorman to stop the car; did she fall

from the car or did she step or jump from it? On all of these questions there was explicit evidence from which the jury could have found the fact either way.

On the first two questions the jury was instructed: "It is, however, for the jury to determine whether the carrier was informed by the passenger or knew her intended destination and whether it was negligent in respect to affording her an opportunity to alight, and that its negligence, if any, was the proximate cause of the injury sustained."

On the third question the jury was expressly instructed, perhaps more favorably than was appellant's right, that if they found that the child stepped or jumped from the car they must bring in a verdict for appellant.

Of a somewhat similar instruction, "that the law presumes that plaintiff, at the time in question here, took ordinary care of his own concerns," our Supreme Court said, in *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 39, 297 P. 884, 886, after holding the instruction erroneous under the state of the evidence: "We question, however, whether this error was of so serious a nature as to justify a reversal of the judgment of the trial court. As already stated, the plaintiff and other witnesses produced by him, including the occupants of his car, testified in detail as to plaintiff's acts and conduct just prior to, and at the time of, the collision. Witnesses produced by the defendant gave their version of the collision, in which they testified as to the acts and conduct of the plaintiff in connection therewith. In the face of this direct and positive evidence, it is hardly conceivable that the jury would have placed any great reliance, if any at all, on any presumption as to plaintiff's conduct, even though they were told by the court that they might do so. In other instructions, and particularly in defendant's instructions No. 20 and No. 27, the attention of the jury was expressly directed to the evidence in this case, and they were instructed that they could not find a verdict in plaintiff's favor, unless they found from said evidence that plaintiff was in nowise guilty of negligence which proximately contributed to said accident. Taking the instructions as a whole, we are satisfied that the jury could not have been misled by the one complained of and which contained the reference to the presumption that the plaintiff took ordinary care of his own concerns."

[5] The language just quoted very aptly fits the facts of this case. The evidence was full and conflicting, many of the instructions were expressly directed to this evidence, and the jury were told repeatedly that they could not find for plaintiffs unless they found defendant negligent from a preponderance of this evidence. In the face of this positive and conflicting evidence and the other instructions of the court, we cannot believe that the jury placed any reliance upon the presumption stated in this challenged instruction.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.



7 Cal.App.2d 551

LESTER et al. v. DOETSCH et al.

PHILLIPS et al. v. SAME.

Civ. 9815.

District Court of Appeal, First District,
Division 2, California.

June 13, 1935.

1. Waters and water courses ☞ 145

Whether plaintiffs, asserting rights to subsurface waters of creek, established prescriptive right against defendants *held* immaterial where facts found by court on sufficient evidence showed that defendants' change of their point of diversion infringed on plaintiffs' right (Civ. Code, § 1412).

2. Waters and water courses ☞ 145

Change in point of diversion of waters by riparian owners and appropriators may not be made to injury of others (Civ. Code, § 1412).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Actions, consolidated for trial, by Nathan L. Lester and others and Thomas E. Phillips and others against Joseph Doetsch and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Tompkins & Tompkins and S. G. Tompkins, all of San Jose, for appellants.

Bohnett, Hill & Cottrell, of San Jose, for respondents.

SPENCE, Justice.

Two actions, which may be referred to herein as *Lester v. Doetsch* and *Phillips v. Doetsch*, were consolidated for the purpose of trial. The pleadings in said actions asserted the adverse claims of the parties to the waters flowing beneath the surface in Los Gatos creek in Santa Clara county. In the case of *Lester v. Doetsch*, plaintiffs therein asserted their rights both as riparian owners and as appropriators. In the case of *Phillips v. Doetsch*, plaintiffs therein asserted their rights as riparian owners. The defendants were the same in both actions and they asserted their rights both as riparian owners and as appropriators. By its judgment, the trial court adjudicated the rights of the parties and issued an injunction against defendants. This appeal is taken by defendants from said judgment.

The controversy arose when defendants changed their point of diversion in the year 1924. For many years prior to that time, both plaintiffs and defendants in the action of *Lester v. Doetsch* had maintained pumping plants for the purpose of obtaining the underground flow. The Doetsch plant was located on the northerly side of the main channel of the creek and about 450 feet above the Lester plant, which last-named plant was located on the opposite side of the main channel of the creek. The width of the entire creek channel was in excess of 1,000 feet and during the dry season of each year there was no visible surface flow of water therein. Each of the pits for the two pumping plants above mentioned was connected with a tunnel or flume running out into the gravel bed. Prior to 1924, each of the plants had pumped all of the water needed for riparian uses as well as for sale to others for use on nonriparian lands. The years 1923 and 1924 were exceptionally dry years in that vicinity, and, as a result there was a lowering of the level of the subsurface waters under the gravel bed. When defendants found themselves unable to obtain the amount of water which they had previously taken, they proceeded to extend their tunnel or flume approximately 150 feet and to erect a new pump at the end of said extension. Said extension was run through a clay bank, impervious to water,

which clay bank was located under the gravel bed. The pumping by defendants from the new point of diversion seriously diminished the supply of water available to plaintiffs, and these two actions were brought.

As above indicated, both riparian rights and appropriation rights were involved in said actions. As to the appropriation rights, it is conceded that defendant's predecessors in interest made a valid appropriation in the year 1912 and it is further conceded the plaintiffs named in *Lester v. Doetsch* made a valid appropriation in the year 1918. The trial court found, "that in said channel on the said riparian land of Defendants there is, and at all times has been, a clay bank or clay reef of impervious clay extending generally parallel with the course of the deepest part of the channel and on the east or southeasterly side of said deepest part of said channel. The apex of said clay reef or clay bank is about six feet above the bottom of the cut extension from the tunnel hereinafter mentioned, and about six feet above the level of the bottom of said tunnel constructed by Defendants' predecessor Briggs, and said reef or bank of clay is triangular in shape with a base about 50 feet wide in the course of said cut hereinafter mentioned; that said clay reef or bank divides the waters when flowing in said creek in their natural flow into two parts or branches, as the waters of said creek flow past the lands of the Defendants, at all times when the waters of said Creek flowing beneath the surface of the ground is below the apex of said clay reef or bank. That said clay bank in said channel extends southerly and westerly beyond the westerly line of said Defendants' land where said Los Gatos Creek enters the said Defendants' land." It further found, "that the water naturally flowing in said creek northerly and westerly of said clay bank, was, prior to said extension of tunnel in 1924, at all times greater than 58.50/174.13 of the entire flow of said creek, and said quantity of water was more than sufficient at all times to supply water for all riparian uses on said lands of defendants."

The trial court found and concluded in effect that as to the riparian rights of the parties, the water flowing in the underground channel lying northerly and westerly of said clay bank or reef was ample for the riparian uses of defendants and

that the water flowing in the underground channel lying southerly and easterly of said clay bank or reef was ample for the riparian uses of the plaintiffs. It further found and concluded in effect that the appropriation made by defendants' predecessors in 1912 was confined to the underground channel lying northerly and westerly of said clay bank or reef, and that the appropriation made in 1918 by plaintiffs named in *Lester v. Doetsch* was from the channel lying southerly and easterly of said clay bank or reef, and, as to said channel, the appropriation by said plaintiffs was prior in right to the attempted appropriation by defendant from said channel in 1924 by means of the extension of their tunnel or flume through said clay bank or reef. The judgment, declaring the rights of the parties and enjoining said defendants from maintaining said extension of their tunnel and from diverting water from said channel on the southerly and easterly side of said clay bank or reef, was therefore entered accordingly.

While defendants challenge the sufficiency of the evidence to support certain findings of the trial court, a review of the record shows that all of the material findings were supported by the evidence introduced and the inferences to be drawn therefrom. There was evidence of the parties as well as that of expert witnesses, and while there were conflicts, we believe that the evidence favorable to plaintiffs was ample to support the findings and judgment.

[1, 2] Defendants devote the major portion of their briefs to a discussion of whether plaintiffs had established a prescriptive right against defendants. We are of the opinion that this discussion is beside the point. Under the facts found by the trial court, it appears that defendants' change of the point of diversion infringed upon the rights of plaintiffs. The rule that a change in the point of diversion may not be made to the injury of others is statutory in this state (Civ. Code, § 1412) and is in accord with the great weight of authority. See 2 *Kinney on Irrigation and Water Rights* (2d Ed.) pp. 1499-1508, and cases cited.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

7 Cal.App.2d 398

PEOPLE v. KNOWLES.

Cr. 1838.

District Court of Appeal, First District,
Division 1, California.

June 6, 1935.

1. Homicide ☞254

Evidence held to support conviction of second-degree murder by abortion operation.

2. Homicide ☞235

In prosecution for homicide by performance of an abortion, evidence held to show that the operation was not necessary to preserve the life of the deceased.

3. Criminal law ☞1122(5)

When record did not show what instructions were given by trial court, alleged failure to instruct on a particular point would not be considered on appeal.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Harry B. Knowles was convicted of murder in the second degree, and he appeals. Affirmed.

Leo A. Sullivan and A. K. Whitton, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant was charged with and convicted of murder in the second degree. From the final judgment of conviction and an order denying a motion for a new trial, this appeal is prosecuted. The crime for which defendant was prosecuted arose out of an abortion committed upon one Mrs. Bodholdt.

Defendant conducted what is known as the Physician's Diagnostic Laboratory in Oakland. He was not a licensed physician and no certificate of approval had ever been issued to this institution while the same was operated by him. Before meeting defendant, Mrs. Bodholdt became pregnant and desired to be relieved of that condition. She had her husband procure certain suppositories and pills from a drug store. These proved ineffectual to bring about the desired result, and Mrs. Bodholdt insisted that her husband take her to their family physician to be relieved of her pregnant condition. The doctor refused to

have anything to do with this character of a case. The husband then visited the office of defendant, who agreed to perform an abortion upon Mrs. Bodholdt. Defendant assured the husband that he had handled a great many cases of this character; that his technique was one in which there was no danger, as he did not use any sharp or cutting instruments. He further stated that his fee for performing an abortion was \$75, but that he would take care of this particular case for \$50. Defendant admitted that he had been paid this latter sum. Later Mrs. Bodholdt entered the private office of defendant, who had in the meantime gathered up some instruments and a bedpan. Defendant remained alone in his private office with Mrs. Bodholdt for about half an hour, and when he emerged therefrom he brought the instruments and bedpan with him. He informed the husband, who was waiting, that he had found dead tissue in his wife's uterus, but that his wife was relieved of her pregnant condition. Later Mrs. Bodholdt again visited defendant's office, and about the same procedure was gone through. At the time Mrs. Bodholdt first visited the office of defendant she was in normal health and had performed her household duties. When she left the office of defendant she was pale and in great pain. From then on her condition grew worse, and she finally died from an acute peritonitis resulting from gas producing bacteria. An examination of the organs of deceased showed that her uterus was recently pregnant, being greatly enlarged, and the walls inflamed, but the pregnant condition had terminated. Defendant denied ever having committed an abortion upon deceased. This, in substance, is the evidence upon which appellant was found guilty of the offense charged.

[1-3] Appellant urges several grounds for reversal, the first of which is that the evidence does not show that death was caused by unlawful means, nor does it show that, if such means were in fact used, they were chargeable to appellant. The facts as above narrated show that there is no merit in this contention. They established deceased was pregnant when she visited appellant's office, and at that time she was in a normal condition; that thereafter she came away pale and in great pain and that shortly after her last visit she passed away. There is also evidence that appel-

lant assured the husband after he had attended the deceased that there was no chance of her having a child. Then, too, there is the additional evidence that appellant agreed to perform the abortion and his admission that he received \$50 for his services. The evidence upon this subject was amply sufficient to support the verdict. *People v. De Vaughn* (Cal. App.) 38 P. (2d) 192. Appellant next contends that the evidence does not show that the operation was not necessary to preserve life. As above stated, the deceased was in normal health except for a pregnant condition. Assuming that the burden was on the prosecution to show that the operation was not necessary to preserve life, the proof upon this point was amply sufficient to show that the operation was resorted to for no such benign purpose. *People v. Brewer*, 19 Cal. App. 742, 127 P. 808. And finally it is contended that the court should have instructed the jury in regard to manslaughter, for the reason that there was evidence to show that appellant violated the Medical Practice Act (St. 1913, p. 722, as amended) in his examination and treatment of the deceased, and the jury could have found that death was caused by unlawful treatment and not abortion. The record does not contain the instructions to the jury, nor does it appear therefrom that any particular instruction was asked for. For aught we know, the court may have instructed the jury on the subject of manslaughter.

The appeal is devoid of merit. The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN,



7 Cal.App.2d 588

PEOPLE v. EUBANKS.

Cr. 2664.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

Hearing Denied by Supreme Court
July 11, 1935.

1. Jury §29(2)

Accused has no constitutional right to stand trial for robbery without a jury, but

trial court has power to require that cause be tried by jury, notwithstanding constitutional provision for waiver of jury trial (Const. art. 1, § 7).

2. Robbery §24(3)

Evidence held to justify conviction of robbery in prosecution raising issue of identity.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Carl B. Eubanks was convicted of robbery, and from the judgments and an order denying motion for new trial, he appeals.

Judgments and order affirmed.

Milton H. Silverberg, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

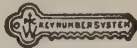
The two counts of the information separately charge robberies committed on August 9, 1934. In count one the property was taken from one Mrs. Misson, and in count two from one John Thompson. On this appeal after conviction, the defendant relies upon two principal contentions, viz., that the trial court denied the right of the accused to stand trial without a jury; and that the evidence does not justify the verdict.

[1] When the case was called for trial, defendant's attorney stated that the defendant "desires to waive trial by jury." The court replied: "I think that we will try the case with the jury. Do you wish to waive the jury trial?" The district attorney replied, "I am willing to waive a jury." The court responded, "I think I will order a jury. I will order a jury, even though you are willing to waive it." It is provided in article 1, § 7, of the Constitution of California, that "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel. * * *" While a defendant charged with felony has a constitutional right to trial by jury, it does not follow that he has a constitutional right to be tried by the court without a jury. In the absence of authority to the contrary, we are of the opinion that the provision of the Constitution for waiver of jury trial does not take away from the trial court its power to require that the cause be tried by jury. See *Regina v. Brewster*, 2 Territories Law (Canada) 353.

[2] The contention of appellant that the evidence is insufficient to justify the verdicts of the jury is without merit. That the robberies were committed is an unquestioned fact. In the Misson robbery the defendant was most positively identified both by Mrs. Misson and by her son. In the other case we find that the witness Thompson clearly and positively identified the defendant as the person who came to his house and took from him the diamond of which he was robbed. The fact that there is other testimony produced by the defendant, tending to prove that the robbery was not committed by him, or that it was committed by another person, has no further effect than that it creates a conflict in the evidence. That furnishes no sufficient ground for reversal.

The judgments are affirmed, and the order denying motion for new trial is affirmed.

We concur: HOUSER, J.; YORK, J.



7 Cal.App.2d 584

OLIPHANT et ux. v. BROWN et al.
Civ. 9245.

District Court of Appeal, Second District,
Division 1, California.
June 14, 1935.

1. Negligence ☞138(2)

Instruction that findings, from preponderance of evidence, that defendant was negligent, that such negligence was proximate cause of plaintiff's injury, and that evidence failed to show by preponderance thereof that plaintiff was guilty of negligence proximately contributing to her injury, were conditions precedent to verdict for plaintiff, *held* not to have imposed burden of proof on plaintiff to show that she was not guilty of contributory negligence.

2. Appeal and error ☞1067 Automobiles ☞246(50)

Where plaintiff's witnesses testified that plaintiff was struck by automobile as she was crossing street within a crosswalk, and evidence on all issues was conflicting and would support verdict either way, refusal to give plaintiff's instruction, quoting from statute, that vehicular traffic must yield right of way to pedestrian crossing roadway within any marked crosswalk, or any unmarked cross-

walk at end of block *held* prejudicial error, particularly in view of instruction that cause did not involve a marked crosswalk (St. 1931, p. 2127, § 131½; Const. art. 6, § 4½).

3. Appeal and error ☞1170(9)

Where evidence as to all issues was conflicting and would support verdict either way, refusal to give correct instruction and giving of an erroneous instruction *held* to require reversal (Const. art. 6, § 4½).

4. Automobiles ☞245(72)

Whether pedestrian struck by automobile as she was crossing street was contributorily negligent *held* for jury.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Sam Oliphant and wife against Lewis Brown and another. From a judgment for the named defendant, plaintiffs appeal.

Reversed.

Stuart McHaffie, of Los Angeles, for appellants.

Harry D. Parker and White McGee, Jr., both of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action by husband and wife for personal injuries to the wife, a pedestrian, struck by an automobile, the verdict and judgment were in defendant's favor and plaintiffs appeal.

Plaintiff Annie Oliphant while crossing the street was struck by defendant's automobile. She sustained injuries consisting of concussion of the brain, a broken left clavicle, and a broken right leg below the knee. Upon this appeal plaintiffs rely for reversal of the judgment upon alleged errors in the refusal of an instruction requested by plaintiffs and the giving of an instruction of the court's own motion.

[1] The instruction given and claimed to be erroneous was a general instruction on negligence, contributory negligence, and proximate cause. It was lengthy and is conceded to have correctly stated the law except in a single particular. It read in part as follows: "In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent but also that such negligence was

the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence contributing proximately thereto; otherwise your verdict must be for the defendant." The instruction referred, of course, to Annie Oliphant, whom we shall speak of as the plaintiff. It is contended that by this instruction the burden of proof was placed upon the plaintiff to show that she was not guilty of contributory negligence. The instruction, however, is not the same as the ones held erroneous in *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066, and *Howard v. Worthington*, 50 Cal. App. 556, 195 P. 709, cited by appellant. The burden of proof was not shifted by the instruction in question; plaintiff was left free to recover unless her contributory negligence was established by a preponderance of the evidence. *Wagy v. Brave*, 133 Cal. App. 413, 24 P.(2d) 209.

[2,3] Plaintiff requested an instruction which quoted, in part, section 131½ of the California Vehicle Act (St. 1923, p. 517, § 131½, as added by St. 1931, p. 2127), to the effect that vehicular traffic must yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or any unmarked crosswalk at the end of a block. The court declined to give this instruction and gave none on the subject of right of way. Respondent contends that the instruction was properly refused because it did not go further and state that a pedestrian crossing the roadway at other places must yield the right of way to the drivers of vehicles. We do not agree with this view. Plaintiff's evidence showed that she was crossing the street in a crosswalk, and she therefore had a right to have the jury instructed upon the assumption that her testimony and that of her witnesses would be believed. The instruction was complete for this purpose. Defendant's witnesses testified that plaintiff was not in the crosswalk, and defendant had the right to have the jury instructed accordingly. The fact that defendant failed to request such an instruction cannot deprive plaintiff of the right to have the jury instructed according to her theory of the case and her evidence.

Upon exceedingly contradictory testimony, the jury was required to determine the question of defendant's negligence, and if

that were resolved against defendant, to determine the question of the contributory negligence of plaintiff Annie Oliphant. A finding that defendant was not guilty of negligence would have been supported by the evidence. Findings that defendant was negligent and that plaintiff Mrs. Oliphant was guilty of contributory negligence would have been supported by sufficient evidence. There was also sufficient evidence to support findings that defendant was guilty of negligence and plaintiff was not guilty of contributory negligence. It is not easy to say from the printed record that the preponderance of evidence was upon the side of either party upon either of these issues of negligence. There are no facts shown, independently of the credibility of the witness or witnesses testifying thereto, which can be accepted as a refutation of any of the testimony given in the case. The evidence, therefore, points the way plausibly to several opposing conclusions. The jury may have believed, as defendant and his passenger testified, that Mrs. Oliphant ran into the side of defendant's slowly moving car. If such was the basis of the verdict, it would carry with it a clear inference that defendant was guilty of no negligence, or, if the contrary were believed, that Mrs. Oliphant was guilty of contributory negligence. The jury may have believed defendant to have been negligent in driving at an excessive speed and that Mrs. Oliphant was also negligent in failing to use the care in crossing the street that the circumstances required. Again, the jury may have believed that defendant was not driving at an excessive speed, but that he approached the intersection and crossed it without giving proper heed to the safety of pedestrians who might be crossing the street. Any one of these conclusions of fact would support a verdict and would find abundant support in the evidence, but we cannot say which one the jury adopted. Plaintiff's right of way had an important bearing upon the issues of negligence and contributory negligence. For these reasons, we conclude that the case of appellants is one fully meeting the requirements of article 6, § 4½, of the Constitution. We are strengthened in this view by the fact that the court gave an instruction, the first sentence of which reads as follows: "This is not a case occurring in a marked crosswalk." By this instruction the jury was told, inferentially, that plaintiff's rights would have been greater had she been crossing in a marked crosswalk. It also

might have been inferred that the rights of plaintiff and defendant were equal, or even that the defendant, as the driver of the vehicle, had a right which was superior to that of pedestrians.

[4] Respondent insists that we should hold plaintiff Annie Oliphant to be guilty of contributory negligence as a matter of law. This we clearly cannot do. The question was one for the jury. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649; *Filson v. Balkins*, 206 Cal. 209, 273 P. 578; *Maggart v. Bell*, 116 Cal. App. 306, 2 P.(2d) 516. As we have already stated, there was sufficient evidence, if believed, to warrant a finding that Mrs. Oliphant was not guilty of contributory negligence.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 624

In re JANVIER'S ESTATE.

LEWIS et al. v. THOMPSON et al.

Civ. 10379.

District Court of Appeal, Second District,
Division 2, California.

June 14, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Appeal and error ⇨1001(1)

Verdict supported by substantial evidence cannot be disturbed on appeal.

2. Evidence ⇨357

In proceeding contesting probate of codicil to will naming testatrix' attorney as legatee, offer of letter from attorney to one of testatrix' next of kin stating that estate had been left to charity and friends, without stating that attorney was a legatee, to show a trait of character of attorney held properly rejected as irrelevant.

3. Wills ⇨384

In proceeding contesting probate of codicil to will, where at close of all the evidence contestants dismissed alleged cause of action based on ground of unsoundness of mind, and rested on ground of undue influence, giving of instructions on subject of soundness of mind held not prejudicial error.

4. Trial ⇨243

Instruction in proceeding contesting probate of codicils to will, that in civil cases preponderance of evidence was all that was required to prove any fact, or overcome any presumption held not in conflict with instruction that presumption of undue influence could be overcome only by the clearest and most satisfactory evidence.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

In the matter of the estate of Louisa S. Janvier, deceased. Proceeding by Eleanor Lord Lewis and others against Raymond G. Thompson and another, as executors, and Raymond G. Thompson, as legatee. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Goudge, Robinson & Hughes, David A. Sondel and Charles M. Fueller, all of Los Angeles, for appellants.

John Perry Wood, of Los Angeles, for respondents.

CRAIL, Justice.

The plaintiffs are contesting the probate of two codicils to the will of the decedent upon the alleged ground of undue influence upon the part of Raymond G. Thompson, who was the attorney for the decedent at the time the codicils were executed and who took part in the preparation of them. One of these codicils bequeathed to the said defendant a part of her estate. The plaintiffs rely for proof upon the presumption of undue influence which the law creates where one who unduly profits by a will sustains a confidential relationship to a testator and actively participates in procuring the execution of the will. In re Estate of Lances, 216 Cal. 397, 14 P. (2d) 768; In re Estate of Witt, 198 Cal. 407, 245 P. 197.

[1] It is the first contention of the plaintiffs that the presumption of undue influence was not overcome by the evidence of the defendants. It is sufficient for us to say that there was substantial evidence to overcome the presumption, and the jury resolved the question in favor of the defendants by a special verdict which this court would not be justified in upsetting on appeal.

[2] The plaintiffs' next contention is that prejudicial error was committed by the trial court in refusing to admit in evidence a letter written by defendant Thompson to one of the kin of the decedent after the death of decedent in which he used the expression, "her estate is left to charity and friends." The plaintiffs contend that the letter shows lack of candor on the defendant's part in failing to state that he was one of the beneficiaries. Contestants urge that "in a case of this kind, the jury was entitled to know all facts from which any reasonable deduction or conclusion might be made respecting the integrity, honesty, candor, truthfulness and character of Mr. Thompson." It is not claimed that the letter misstates the facts or that the letter contradicts in any respect the testimony of the defendant. It was not offered for impeachment purposes, but in order to show a trait of character of the defendant. A trait of character can not be so shown, and in any event the character of the defendant for candor was not in issue.

[3,4] The plaintiffs contend that the court committed prejudicial error in several of its instructions to the jury. In this regard it is first contended that the court erred in giving several instructions on soundness of mind, whereas the case was tried solely on the question of undue influence. The fact is, however, that the contest based on unsoundness of mind was before the jury until the evidence on both sides was closed and requests for instructions had been handed in by the respective parties, at which time the plaintiffs dismissed their cause of action based on the ground of unsoundness of mind. We find no prejudicial error in this regard. The plaintiffs also claim error because the court gave the following instruction: "In civil cases, a preponderance of evidence is all that is required to prove any fact or overcome any presumption." They contend in this regard that the instruction contradicts two instructions presented by the plaintiffs and given to the jury by the court in which the jury were told that a presumption of undue influence can be overcome only by the clearest and most satisfactory evidence. There is no conflict here. Judicial expressions concerning the necessity of clear and satisfactory proof must be construed in the light of the fundamental rule that a preponderance of the evidence controls in civil cases.

Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; *Edmonds v. Wilcox*, 178 Cal. 222, 172 P. 1101. The other contentions of the plaintiffs with regard to the instructions are equally without merit.

Judgment affirmed.

I concur: FRICKE, Justice pro tem.

STEPHENS, Presiding Justice.

I concur in the opinion and in the judgment. But in doing so I cannot refrain from again adverting to the high duty of lawyers to avoid even the suspicion of personal interest in their confidential relation of counsellors to their clients. In the instance of this case, the attorney-beneficiary is outstanding in ability and reputation for his integrity. The fact that over three and one-half years elapsed between the execution of the codicil considered herein and the death of the maker, during which elapsed time the maker was competent and came in contact with the attorney only very occasionally, coupled with the other testimony of the case, completely negatives any suspicion of undue influence or persuasion.



7 Cal.App.2d 276

IN RE BETTINGEN'S ESTATE.

ELLIS v. BETTINGEN.

Civ. 10119.

District Court of Appeal, Second District,
Division 1, California.

May 31, 1935.

1. Executors and administrators ⇨283

Creditor of estate held entitled to institute proceedings to compel executrix to pay into estate sum which she agreed to pay upon distribution of property to executrix without first taking steps to compel executrix to petition court for an order requiring payment of claim, where it would have been useless to make a demand upon executrix in that she was also sole devisee and legatee of estate (Probate Code, §§ 1001, 1002).

2. Executors and administrators ⇨283

Creditor of estate, executing consent to granting of petition for distribution and waiving any claim to property proposed to be

distributed to devisee upon condition that devisee pay creditors their claims, *held* not estopped to seek payment of his claim, since it would be presumed that in consenting to decree creditor acted in reliance upon provisions of law, including right to have payment made to estate by distributee of money in lieu of property distributed when such payment became necessary to provide for payment of creditor's claim (Probate Code, § 1001).

3. Executors and administrators ⇐283

Order providing that executrix, who was sole devisee, pay certain sum to herself to discharge the indebtedness due from estate to named creditor *held* error where there was at least one other outstanding unpaid claim against estate, and petition of creditor only called upon executrix to show cause why an order should not be made requiring her to pay into estate a certain sum for paying claims of creditors entitled thereto (Probate Code, §§ 1001, 1002).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of William J. Bettingen, deceased, by A. B. Ellis against Mary C. Bettingen. From a decree, defendant appeals.

Amended and affirmed.

F. A. Stephenson and H. P. Hibbard, both of Los Angeles, for appellant.

Ralph C. Curren, of Los Angeles, for respondent.

CONREY, Presiding Justice.

William J. Bettingen died in the county of Los Angeles, leaving both real and personal property therein. By the terms of his will, which has been duly probated, the sole devisee and legatee is his wife, Mary C. Bettingen, who is the duly qualified executrix under said will.

In the course of administration, such proceedings were had that by a decree of partial distribution a valuable apartment house property, together with its furniture and equipment, was distributed to Mrs. Bettingen. This distribution was made with the express consent of one A. B. Ellis, a creditor whose claim had been duly approved. On April 17, 1933, Ellis filed his petition upon which an order to show cause was issued, wherein Mrs. Bettingen was directed to appear and show cause why an order should not be made

requiring her to pay into the estate for the purpose of paying claims of creditors entitled thereto the sum of \$17,000. Mrs. Bettingen having filed her answer, the matter came on for hearing, and after hearing the evidence the court ordered "that Mary C. Bettingen pay to Mary C. Bettingen as executrix of the above entitled estate the sum of \$17,000 to be used by her to discharge the indebtedness due from said estate to A. B. Ellis." From that order Mrs. Bettingen in her individual capacity presents her appeal.

The partial distribution of the estate to Mrs. Bettingen was obtained by a proceeding under the provisions of section 1661 of the Code of Civil Procedure, which on August 14, 1931, was superseded by section 1001 of the Probate Code. The proceedings under the order to show cause and the order from which the present appeal is taken are governed by section 1002 of the Probate Code. That section reads as follows: "When a bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. If satisfied, upon the hearing, of the necessity of such payment, the court shall make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action on the bond may be maintained by the executor or administrator."

[1] It is contended by appellant that respondent, as a creditor of the estate, was not entitled to institute the proceeding here in question without first taking steps to compel the executrix to proceed pursuant to said section. From the record before us, it is plain that it would have been useless to make demand upon the executrix that she apply to the court for an order to compel herself to return the money to the funds of the estate. The question is one of procedure and not of jurisdiction. Under the circumstances shown by the evidence in this case, the court had inherent power to require the return of the money to the estate. Hey-

denfeldt v. Superior Court, 117 Cal. 348, 49 P. 210. To sustain the contention of appellant on this point would be to deprive the court of its power. "Indeed, while the legislature may regulate the mode in which the court shall exercise its jurisdiction, it cannot circumscribe its powers." *Burris v. Kennedy*, 108 Cal. 331, 337, 41 P. 458, 459.

[2] At the time when the partial decree of distribution was made to appellant of certain described property of the estate, the two creditors of the estate, of whom respondent was one, executed a consent to the granting of the petition for distribution and thereby waived and disclaimed "any and all right which they, or either of them, has or may have for the repayment or redelivery by the said widow of the property so proposed to be distributed to her, to the estate of said decedent for the purpose of paying the claims, or any claim, of the said creditors." This waiver was made upon the consideration (in addition to the statutory bond) that Mrs. Bettingen warranted to the creditors that their claims would be paid. Appellant now contends that by reason of the waiver above mentioned respondent became estopped to make any subsequent claim to the benefit of section 1001 of the Probate Code. But, on the contrary, we think that it must be presumed that in consenting to the decree of partial distribution respondent acted in reliance upon the provisions of the law, including the right to have payment made to the estate by the distributee, of money in lieu of the property distributed, when such payment became necessary in order to provide for payment of the claim.

[3] The order from which this appeal has been taken provided that the appellant pay to herself as executrix of the estate the sum of \$17,000 "to be used by her to discharge the indebtedness due from said estate to A. B. Ellis." It is now contended that in any event the court was without power to provide that any sum be used for the benefit of any particular creditor to the exclusion of others. It appears that there is at least one outstanding unpaid claim against the estate other than that of respondent, that is to say, a claim in favor of one C. A. Bettingen, who is not a party to this present proceeding. The petition of respondent only called upon Mrs. Bettingen to appear

and show cause "why an order should not be made requiring her to pay into the estate for the purpose of paying claims of creditors entitled thereto the sum of \$17,000." We think that the court erred in directing the payment of the money specifically to A. B. Ellis. The matter of application of the funds of the estate to the payment of creditors' claims should be left open for settlement in a subsequent proceeding in the course of administration.

The order is hereby amended by striking therefrom the words "to A. B. Ellis." As so amended, the order is affirmed.

We concur: HOUSER, J.; YORK, J.



8 Cal.App.2d 46
WEAVER v. CITY OF LOS ANGELES et al.
Civ. 10137.

District Court of Appeal, Second District,
Division 2, California.
June 25, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

Appeal and error $\hookrightarrow$ 979 (2)

Where trial court granted new trial on ground that evidence was insufficient to sustain jury's verdict, ruling would not be disturbed on appeal in absence of abuse of discretion.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Jerry Weaver against the City of Los Angeles and another. Judgment for defendants. From an order granting a new trial, defendants appeal.

Order affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheatcroft, Deputy City Atty., all of Los Angeles, for appellants.

Clyde C. Triplett and Joseph Dickson, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an action for damages for personal injuries sustained in an automobile accident. Plaintiff, a cripple, was a pedestrian. The car which struck her was

owned by defendant city and was driven by defendant Stone. The jury returned a verdict in favor of the defendants. Subsequent to the entry of the judgment, plaintiff moved for a new trial. The court granted said motion on the ground that the evidence was insufficient to sustain the verdict. It is from said order that this appeal is prosecuted.

"The sufficiency of the evidence being a question of fact which the trial court is authorized to review, the exercise of its discretion is not error of law which may be disturbed upon appeal except in extreme cases, as where an abuse of discretion appears. * * *" See cases cited in 20 Cal. Jur. 114. There was a substantial conflict in the evidence both as to the negligence of the defendant and as to the negligence of the plaintiff. We cannot say as a matter of law either that the defendant was free from negligence or that the plaintiff was guilty of negligence which contributed to her injuries.

Order affirmed.

I concur: STEPHENS, P. J.



7 Cal.App.2d 600

PEOPLE v. WILLIAMS.

Cr. 2686.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

1. Criminal law ⚡507(5)

Generally, one who receives stolen property is not an "accomplice" of the thief within the rule requiring corroboration of testimony (Pen. Code, § 1111).

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

2. Criminal law ⚡507(5)

In prosecution for receiving stolen goods, party who sold property to accused, telling him it had been stolen, held not "accomplice" within statute requiring corroboration (Pen. Code, §§ 31, 1111).

Dwight Williams was convicted of the crime of receiving stolen property, and he appeals.

Affirmed.

Robert B. Agins and A. Edward Nichols, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Bel-ford, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

Defendant was convicted of the crime of receiving stolen property. The principal witness for the prosecution was the thief, one Brown, who testified that he stole an automobile, stripped it, and on the same day sold a radio taken therefrom to defendant for \$5. Brown testified that he told the defendant that the radio was "hot stuff," and the evidence showed that defendant had on prior occasions purchased other automobile accessories from Brown, knowing the same to have been stolen. Defendant denied that he knew the radio was stolen or that he bought the same, asserting that he did not buy the radio, but loaned Brown \$5 until the following Saturday, accepting the radio as security. Without rehearsing all the testimony, it is sufficient to say that there was ample to justify the jury in reaching the conclusion beyond a reasonable doubt that the defendant knew he was buying stolen property when he bought the radio. Defendant contends, however, that Brown was an accomplice, and that his testimony should have been received as such. There can be no doubt that much, if not all, of the important portion of the testimony was that of Brown, who stole the property, and while Brown's testimony is corroborated in many particulars, and only slight corroboration is necessary to convict on the testimony of an accomplice (People v. Follette, 74 Cal. App. 178, 240 P. 502), it is by no means certain that the conviction would have resulted had the testimony of Brown been received as if it were that of an accomplice and the jury properly instructed on what an accomplice is, and that the testimony of an accomplice must be corroborated, on either of which subjects instructions of any kind were given.

The primary question on this appeal is, therefore, whether a thief who sells stolen property to a third person, telling such third party that the property has been stolen, thus becomes an accomplice in the

Appeal from Los Angeles County;
Charles S. Burnell, Judge.

crime of receiving stolen goods. If Brown was an accomplice, then there is no question but that defendant was entitled to an instruction on what constitutes an accomplice, and that the testimony of an accomplice must be corroborated.

[1, 2] It is generally settled that one who receives stolen property is not an accomplice of the thief (People v. Evans, 34 Cal. App. 284, 289, 167 P. 190, cited in 9 A. L. R. 1397) within the rule requiring corroboration of testimony (Pen. Code § 1111). The converse, however, has met with differing views. Leon v. State, 21 Ariz. 418, 189 P. 433, 9 A. L. R. 1393, 1397; People v. Kupperschmidt, 237 N. Y. 463, 143 N. E. 256, 32 A. L. R. 447; In re Morton, 179 Cal. 510, 513, 514, 177 P. 453; People v. Layman, 117 Cal. App. 476, 480, 4 P.(2d) 244. The California rule and the weight of authority is to the effect that a thief is not an accomplice to the crime of receiving stolen goods. The New York rule (People v. Kupperschmidt, 237 N. Y. 463, 143 N. E. 256), followed by much respectable authority (32 A. L. R. 447), and based upon sound logic, is that the thief is and can be an accomplice of one to whom he sells stolen goods under circumstances such as disclosed by the evidence in the case at bar. The reason, however, for the difference in the New York rule and that of our own state is to be found in the fact that in 1915 section 1111 of the Penal Code was amended adding a definition of "accomplice." Section 399 of the Code of Criminal Procedure of New York requires corroboration of the testimony of an accomplice, as does section 1111 of our Penal Code, and section 2 of the New York Penal Law (Consol. Laws N. Y. c. 40) is substantially the same as section 31 of our Penal Code, but section 399 of the New York Criminal Code does not define an accomplice, and, as pointed out, ours does. The effect of this difference, when read in connection with sections 31 and 1111 of the Penal Code, is pointed out in People v. Layman, 117 Cal. App. 476, 479, 4 P.(2d) 244, 246, where the court says: "The amendment of 1915 (St. 1915, p. 760) consisted in adding these words of definition, by limitation, to the section: 'An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' One's first impression is that this definition makes no

change in the law, for in People v. Coffey, supra [161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704], accomplices are defined as being: 'All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission.' But this definition is a quotation from section 31 of the Penal Code, stating such persons to be principals, and, by section 971 of the same Code, they are to be prosecuted as such. The break in this chain of reasoning is made by interpreting the words 'one who is liable to prosecution for the identical offense charged,' as limited to one who is so liable *because he is a principal in fact*, and as not applying to one *who is a principal only by the effect of section 31*. (Italics ours.) So, it has been held, both parties to the crime of incest are accomplices, if adult and competent, because each is in fact a principal. * * * The witness was held an accomplice in People v. Allison (1927) 200 Cal. 404, 253 P. 318, not because he aided in the burglary with which the defendant was charged, but because as principal in fact he had a part in it."

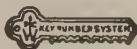
Prior to the 1915 amendment to section 1111, Penal Code, the law may have been that the thief could be an accomplice of one receiving stolen goods from such thief (People v. Solomon, 6 Cal. Unrep. 305, 58 P. 55; People v. Clausen, 120 Cal. 381, 52 P. 658; People v. Ribolsi, 89 Cal. 492, 26 P. 1082; People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am. St. Rep. 65); but since In re Morton, 179 Cal. 510, 177 P. 453, 454, decided since the amendment, there can be no doubt that California no longer follows that rule. In the In re Morton Case, 179 Cal. 510, at pages 513, 514, 177 P. 453, 454, the court says: "In their reply brief, counsel insist that the accusation against appellant charged him with the commission of a felony, wherein Robertson and his wife were accomplices, and that, as provided in section 1111, Penal Code, a conviction cannot be had upon the uncorroborated testimony of an accomplice who is defined to be 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' Assuming the accusation charged appellant with the commission of acts which constituted a felony, namely, that of receiving

personal property, knowing the same to have been stolen, Robertson and his wife could not be deemed liable to prosecution for such offense, since they were the ones who committed the theft. The case of *People v. Kraker*, 72 Cal. 459, 14 P. 196, 1 Am. St. Rep. 65, upon which appellant relies in support of his proposition, is not in point, for the reason that, among others, it was decided before the amendment of 1915 of section 1111, which added the clause above quoted."

There is no merit in defendant's contention that he was prejudiced by remarks made by the trial judge. We have not only read the remarks called to our attention, but have attentively scrutinized the whole record, and find nothing prejudicial in any of the remarks or rulings made by the trial court.

The judgment and order are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 672

PEOPLE v. KING.

Cr. 285.

District Court of Appeal, Fourth District,
California.

June 19, 1935.

1. Robbery ☞24(1)

Evidence *held* to sustain conviction for robbery.

2. Witnesses ☞379(2)

In robbery prosecution, accusatory statements made by actual perpetrator of crime that defendant had said certain shop was "an easy place to take," as defendant had robbed it once before, *held* properly admitted for purpose of showing witness had made previous statements conflicting with testimony at trial, although witness tried to exonerate defendant while on stand, where witness admitted on stand he had made statements.

3. Criminal law ☞511(4)

In robbery prosecution, accusatory statements of witness that defendant had told him certain shop would be "an easy place to take," because defendant had robbed it once

before, *held* sufficiently corroborated by defendant's silence when confronted with statements and where there was other evidence that parties were together all evening before and after robbery, that they used defendant's car, and that they were seen together at various clubs.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

William Edward King was convicted of robbery, and he appeals.

Affirmed.

George A. Westover and W. R. Ives, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

On December 9, 1934, the defendant spent the early evening at El Cajon in company with three other young men, Taylor, Osborne, and Smith. About 10 o'clock the four started for San Diego in the defendant's car, which he drove. On the way the defendant told Smith that a certain doughnut shop would be "an easy place to take," as he had previously held it up. On arriving at this doughnut shop Smith went in, and, threatening the proprietor with a pistol, took certain cash and other articles from the cash register while the other three waited in the defendant's automobile. After Smith returned to the car, they drove rapidly to another point, where Smith held up a liquor store while the others again waited. After the second hold-up Smith gave the defendant a part of the cash taken, although it does not clearly appear from which place it came, and the party then visited various night clubs.

The defendant was charged with the crime of robbery under two counts; the first relating to the robbery of the doughnut shop and the second to the robbery of the liquor store. He was convicted on the first count, and has appealed from the judgment entered and from an order denying his motion for a new trial. It is earnestly contended that there is nothing in the record to connect the appellant with the offense in question, since Smith testified at the trial that he went into the doughnut shop to purchase some doughnuts because he was hungry, that he conceived the idea of robbing the place after he entered the same, and that it was there-

fore impossible for appellant to have known anything about it.

[1] The first contention that the evidence is not sufficient to sustain the verdict against the appellant is largely based on the fact that Smith, while on the witness stand, assumed the entire responsibility for the holdup and attempted to exonerate the appellant. Smith's story as told on the witness stand was equivocal and almost unbelievable, and did not agree with the story he had previously told to the officers. Although he testified that the appellant knew nothing of his intention to hold up the doughnut shop, he inadvertently involved him when he also testified that he had talked with him and that the appellant said he did not want to go into the doughnut shop because "he had held up that fellow once before." The only inference reasonably to be drawn from the language used in this conversation is that the appellant knew that this place which he had held up "once before" was to be held up again. Smith also, and again inadvertently, admitted on the stand that he had previously told Officer Berg the story which Berg repeated to the appellant in the presence of Taylor, Osborne, and Smith, as having been told him by Smith.

Officer Berg testified that on December 20, 1934, in the presence of the appellant, Taylor, Osborne, and Smith, he told them that Smith had stated that on this trip into San Diego he had a conversation with the appellant in which the appellant said that this doughnut shop would be an easy place to take as he had held it up before; that he took a gun which Osborne gave him and went into the doughnut shop and held up the proprietor while the other boys waited around the corner; that he returned to the car; that they proceeded toward downtown San Diego, and, when they arrived at the liquor store, he called out, "What about this? Stop"; that he got out of the car, and, while the other boys waited, he held up the liquor store, obtaining certain money; that as they went along he gave a part of the money to the appellant; and that they then visited certain night clubs. He then testified that, after repeating this story to the four, he asked the appellant what he had to say, and the appellant replied, "I have nothing to say." He then asked him whether or not this story was true, to which the appellant replied, "I have nothing to say." During the same conversation the appellant was told that

Osborne had told a story similar in all respects to that told by Smith. This conversation, in the presence of the four parties involved, was taken down by a police stenographer. The officer testified that Smith had told him this story, which Smith admitted on the stand, and the jury was justified in accepting it as the true version of what occurred and in not believing his testimony to the effect that the appellant knew nothing of his intention to rob the doughnut shop. This, with the obvious inference from his admission that the appellant had told him that he had robbed this doughnut shop "once before," with the undisputed evidence that the appellant was present, with the evidence as to the appellant's attitude at the time Smith's accusatory statement was repeated to him, and with the officer's testimony that the appellant refused to answer when directly asked whether or not the story told by Smith which had been repeated to him was true, is sufficient evidence to connect the appellant with the crime in question and to sustain the judgment.

[2] It is next urged that the court erred in admitting the accusatory statements into evidence. Not only were these statements properly admitted [*People v. Su-soeff*, 129 Cal. App. 78, 18 P.(2d) 442; *People v. Egan*, 133 Cal. App. 152, 23 P.(2d) 1042; *People v. Bisbines*, 132 Cal. App. 239, 22 P.(2d) 762], but the witness Smith admitted on the stand that he had made these statements to the officer, and they were also admissible for the purpose of showing that Smith had previously made statements conflicting with his testimony at the trial. The appellant asked for no instructions limiting the effect of this evidence, and no complaint is made of the instructions which were given.

[3] It is next urged that, even if these accusatory statements were admissible, they were made by accomplices, and that they are without corroboration. Not only did the silence of the appellant, when confronted with these statements, constitute evidence indicating an admission of guilt (*People v. Estrado*, 49 Cal. 171; *People v. Lapara*, 181 Cal. 66, 183 P. 545), but there was other evidence that these four parties were together all of that evening, before and after the robbery in question, that they used the appellant's car, and that they were seen together at various clubs. There was sufficient corroboration to meet the requirements of the rule referred to, especially in

view of the appellant's attitude toward the accusation, which amounted to an admission under the circumstances.

A further consideration is that the appellant did not take the stand or deny any of the statements or other evidence produced against him. A reading of the entire record does not indicate any miscarriage of justice, but, on the other hand, is most convincing as to his guilt.

The judgment and order appealed from are affirmed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.



8 Cal.App.2d 126

JOHNSON v. JOW et al.
Civ. 10200.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

Automobiles Ⓒ245(90)

In action for injuries sustained when plaintiff was struck while crossing street on foot by truck driven by defendant, whether plaintiff was guilty of negligence proximately contributing to his injuries *held* for jury.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Charles Johnson against Tomio Jow and others. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Ira J. McDonald, Paul Barksdale D'Orr, and Thomas A. Reynolds, all of Los Angeles, for appellant.

Mathes & Sheppard and Robert A. Cushman, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

At 11 o'clock Christmas night plaintiff attempted to cross San Pedro street in

the city of Los Angeles, going east on the north side of Winston street where the two streets intersect. A truck driven by defendant Jow was going north on the east side of San Pedro street. It was seen by plaintiff when he was halfway across, but he proceeded on and was struck. He sued to recover damages for injuries thus incurred, and from judgment for defendants takes this appeal.

When examined by the physician at the hospital to which he was taken for treatment for his injuries plaintiff was found to be intoxicated. The evidence as to whether he was crossing in the crosswalk or at a point some distance to the south of it was such that the jury may reasonably have concluded that he was crossing at a point outside the crosswalk, that his conduct was negligent, and that such negligence proximately contributed to the accident and to the injuries complained of.

An examination of the instructions assailed by appellant as being prejudicially erroneous discloses nothing which could have misled or confused the jury.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 652

BOUCHARD v. REED.

Civ. 9343.

District Court of Appeal, Second District,
Division 1, California.

June 18, 1935.

1. Appeal and error Ⓒ907(3)

On appeal on judgment roll alone, conclusive presumption exists that findings are supported by evidence.

2. Limitation of actions Ⓒ55(1)

Action for enticement of wife from her husband *held* barred one year after last wrongful act of defendant.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Frank F. Bouchard against Harry Reed. From a judgment for defendant, plaintiff appeals.

Affirmed.

Charles Matthews and Hare & Walden, all of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

PER CURIAM.

The judgment in favor of respondent is based upon the conclusion of law of the trial court that plaintiff's cause of action was barred by the statute of limitations.

The action is one for enticement of plaintiff's wife from her husband, and the appeal is upon the judgment roll alone.

The findings of fact are that plaintiff and his wife, Euren L. Bouchard, had been married for some years prior to 1928, and at that time were living together; "that by 1928 the said Euren L. Bouchard was infatuated with the defendant and had then lost her affections for her husband; that it is true that commencing about the year 1924 the defendant began, and thereafter and until July 14, 1931, continued, to seek the society of the said Euren L. Bouchard and on frequent and divers occasions during said period was in the company and presence of said Euren L. Bouchard; that on many of said occasions the said defendant exhibited affection to and for the said Euren L. Bouchard and conducted himself toward her in a manner and fashion calculated to, and which did, win the affections of said Euren L. Bouchard; that said actions on the part of said defendant were wrongful, wilful, malicious, wicked and unlawful and were such as were calculated to, and which did, injure the plaintiff and deprive him of the comfort, society and affections of his said wife; that it is not true that the defendant intended to, or did, entice or induce said Euren L. Bouchard to separate, leave or desert her said husband." The court further found that "plaintiff has become and now is estranged from his wife and that her affections, esteem and regard for plaintiff have been wholly destroyed; that it is not true that plaintiff's wife, either by reason of the matters alleged in plaintiff's complaint or otherwise, deserted or abandoned plaintiff on or about October 15, 1931; * * * that plaintiff and his said wife continued to reside in the same house

until October 15, 1931, at which time the said plaintiff departed therefrom and has ever since continued to reside separate and apart from his said wife * * *."

[1,2] It thus appears that although defendant's wrongful actions continued until July 14, 1931, plaintiff's wife never left her husband, but that he left her in October, 1931. No act of the defendant upon which any liability to the plaintiff can be based, nor any change of conditions other than plaintiff's act of leaving his wife, is shown by the findings to have occurred after July 14, 1931. Upon an appeal on the judgment roll alone, it is conclusively presumed that the findings are supported by the evidence. *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.(2d) 5. If a cause of action could arise in plaintiff's favor without his wife leaving him, it became barred one year after the last wrongful act of the defendant. *Harp v. Ferrell*, 115 Cal. App. 160, 300 P. 978. Plaintiff's complaint was filed August 8, 1932, and upon the findings of fact before us his action was barred at that time.

The appeal is entirely without merit, and the judgment is affirmed.



BOND et al. v. CITY OF PASADENA. *
Civ. 9340.

District Court of Appeal, Second District,
Division 1, California.

June 12, 1935.

As Modified on Denial of Rehearing
July 11, 1935.

Hearing Granted by Supreme Court
Aug. 9, 1935.

1. Municipal corporations ☞658

Streets of city are held by it in trust for public.

2. Municipal corporations ☞921(3)

Proceeds of sale of bonds authorized to be issued for work must be used exclusively for payment of public work undertaken, and, as such, constitute a trust fund.

3. Set-off and counterclaim ☞41

Essential basis of right to set-off is mutuality, which requires that debts should be

due to and from same persons, in same capacity.

4. Municipal corporations ☞894

City cannot by its charter provisions take away property of individual by refusing to pay its just debts, where no right of set-off exists.

5. Municipal corporations ☞353

City could not refuse payment of money due to contractor's assignee on account of street improvements on ground that assignor was indebted to city upon judgment for claim arising out of other street improvement contracts, notwithstanding charter provided that no demand shall be approved in favor of any person or his assignee who is indebted to city, where assignee's claim was for paving street intersections, cost of which was payable out of city's general fund and was not assessable against property owners, whereas judgment against assignor was obtained by city in capacity of trustee for municipal improvement district (St. 1915, p. 99, § 1; Gen. Laws 1931, Act 8199; St. 1933, p. 2782, § 5).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by G. W. Bond and another, co-partners doing business under the firm name and style of G. W. Bond & Son, against the City of Pasadena. From a judgment for defendant, plaintiffs appeal.

Reversed, with directions.

Crouch & Crouch, of Los Angeles, for appellants.

Harold P. Huls, City Atty, and John W. Holmes, Deputy City Atty., both of Pasadena, for respondent.

PER CURIAM.

The question presented on this appeal concerns the right of a municipality to refuse payment of money admittedly due on account of street improvements to the assignee of a contractor, upon the ground that the assignor is indebted to the city upon a judgment in its favor upon a claim arising out of other street improvement contracts. The facts are undisputed.

In 1926, Ducey & Breitenstein entered into contracts with the city under the provisions of the Municipal District Improvement Act of 1915 (Stats. 1915, p. 99), for the improvement of certain streets. After the work was completed and they had been paid the amount fixed by the contracts for

the work, the city commenced an action against them to recover overpayments and double payments alleged to have been made. In this action judgment was entered in favor of the city for the sum of \$43,156.18 and interest.

After the work under these contracts was completed and accepted and before the judgment was secured against them, Ducey & Breitenstein were awarded a contract by the respondent city for the improvement of Lake avenue under the provisions of the Improvement Act of 1911. Deering's Gen. Laws, 1931 Ed., Act 8199. The contract was made on June 12, 1929, and on August 26, 1929, appellants took an assignment thereof as security for loans and advances and to carry into effect a purchase contract for the assessments and bonds to be thereafter issued.

Under the charter of the respondent city, the cost of improving street intersections is not assessed against property owners, but is paid out of its general or other appropriate fund. After the work was completed and accepted, the city delivered to the appellants its warrant, assessment, and diagram under which the amount payable by the city for the work at intersections was determined to be the sum of \$13,213.01. Appellants duly filed with the city their demand for this amount, which demand was rejected upon the ground that appellant's assignors were indebted to the city in an amount more than the demand. Whether or not appellants are entitled to payment under these circumstances is the sole question to be determined.

The charter of the respondent city provides: "No demand shall be approved by the City Controller [Auditor] in favor of any person or officer, or the assignee of any person or officer, who is indebted to the city without first deducting the amount of such indebtedness." Stats. 1901, p. 884, as amended; Pasadena City Charter (1933) art. 11, § 5 (St. 1933, p. 2782, § 5). An ordinance of the city of Pasadena (No. 1924) requires all demands upon the city treasury to be presented to the city controller, whose duty it is to verify the same as to validity and accuracy. Appellants contend that these provisions are not applicable to them in the present situation because their claim is payable from the general funds of the city, while the judgment rendered in its favor against their assignors was obtained by the city in a trustee capacity and may not be set off against it for that reason.

The Municipal District Improvement Act, *supra*, provides that: "Any portion of a municipality incorporated under the laws of this state may be formed into a municipal improvement district for the purpose of creating an indebtedness, to be represented by bonds of said district, the proceeds from the sale of which shall be used for the acquisition or construction therein of any public improvement work or public utility which such municipality is authorized by law to acquire or construct." Section 1. It also provides that such a district may be formed upon petition of the electors residing in the territory proposed to be formed into the district; that the municipal legislative body shall thereupon call an election for the purpose of submitting the formation of the district to them; and that if the proposal is approved, the work shall be done under contract made with and under the supervision of that body. Under the act the legislative body is authorized to issue and to sell the bonds of the district, "and the proceeds of the sale of such bonds shall be placed in the treasury of such municipality to the credit of the proper district fund and shall be applied exclusively to the purposes and objects mentioned in the ordinance or resolution ordering the holding of the bond election as aforesaid." St. 1915, p. 103, § 8.

[1, 2] It is a fundamental principle of law that the streets of a city are held by it in trust for the public. The measure of authority of the respondent city over its streets is to be found in its charter. "But whatever rights the city may have over its streets, by virtue of constitutions or statutes, its powers are essentially those of a trustee for the benefit of the cestui qui trust (the public), liberally construed for its benefit, strictly construed to its detriment." McQuillin on Municipal Corporations (2d Ed.), vol. 1, p. 638. This is particularly true where the city is acting in behalf of an improvement district formed under the provisions of the act referred to. Under it the city does not initiate the proceeding, but acts at the pleasure of and for the benefit of the citizens and property owners within the district. The proceeds of the sale of the bonds authorized to be issued for the work must be used exclusively for the payment of the public work undertaken, and, as such, constitute a trust fund. Any amount received by the city in satisfaction of the judgment would become a part of such fund. The indebtedness represented by the judgment is, therefore, due to the respondent city as trustee for the

benefit of the property owners within the municipal improvement districts.

While not entirely controlling, it may be observed that the city sued Ducey & Breitenstein in the capacity of trustee. In the complaint upon which it secured judgment it alleged: "That as to the public improvement proceedings herein set forth, and as to the supervision over and payment for the performance of the said contract No. 1203, the City of Pasadena was and now is trustee and has acted and now acts as trustee for the owners of the taxable property within the said Municipal Improvement District No. 3 in so far as such owners have become burdened with the obligation of the bonds of the said district issued and sold as hereinbefore alleged." It is the judgment based upon these allegations which it now seeks to set off against plaintiff's claim.

[3-5] The essential basis of the right to set-off is mutuality. "Not only the parties but the debts must be mutual. The principle of mutuality requires that the debts should be due to and from the same persons, in the same capacity." 23 Cal. Jur. 262; see, also, 24 R. C. L. 858. "In order to warrant a set-off, 'the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity.' 19 Cyc. 894. The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors. They are not held by him in the same capacity as would be the case if the corporation was not insolvent and had itself sued the stockholder for his subscription, hence a set-off is not permitted." *Kaye v. Metz*, 186 Cal. 42, 49, 198 P. 1047, 1049. The city admits that such is the general rule, but takes the position that it cannot apply in this case because of the language of its charter that "no demand shall be approved * * * in favor of any person * * * or the assignee of any person * * * who is indebted to the city." However, the city cannot by its charter provisions take away property of an individual by refusing to pay its just debts, where no right of set-off exists.

The judgment is reversed, and as respondent city has admitted by its answer that its board of directors by resolution authorized the payment of the sum of \$13,213.01, and that plaintiff has duly presented its claim therefor, the trial court is directed to enter judgment in favor of the plaintiff for said sum.

8 Cal.App.2d 69

**BRUNSWICK TIRE CORPORATION v.
CREDIT TIRE STORES, Inc., et al.**
Civ. 9872.

District Court of Appeal, Second District,
Division 2, California.

June 26, 1935.

Judgment Ⓒ815

Arizona court's dismissal of action without prejudice *held* not a bar to subsequent action in California.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by the Brunswick Tire Corporation against Credit Tire Stores, Inc., and another. From a judgment for plaintiff, the defendant Robert Rae appeals. On respondent's motion to dismiss appeal, or affirm the judgment.

Motion to dismiss denied, and motion to affirm granted.

Holton & Schuelke, of Whittier, for appellant.

Gold, Silk & Quittner, of Los Angeles, for respondent.

CRAIL, Justice.

This is a motion to dismiss the appeal or affirm the judgment under rule V, section 3, Rules of the Supreme Court and District Courts of Appeal.

Appellant contends that three questions are involved on this appeal, and for convenience we state them in the language of the appellant, although none of them is applicable to the facts which appear in the record: "(1) Where no words of qualification such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings upon the subject accompany an order or decree of dismissal in the State of Arizona, is such order or decree presumed to be rendered on the merits? (2) Is such an order so made, as aforesaid, *res judicata* as to the issues raised in the Complaint so dismissed, under the laws of the State of Arizona? (3) May a litigant whose cause of action has been, by an order or decree of a court of competent jurisdiction in the State of Arizona, so dismissed as aforesaid, maintain an action in the State of California upon the same cause of action and against the same parties as the one so dismissed?"

The record before us shows that the case in Arizona upon which appellant relies was dismissed "without prejudice." There is no merit in this appeal.

The motion to dismiss is denied, and the motion to affirm is granted.

We concur: STEPHENS, P. J.;
SCOTT, Justice pro tem.



7 Cal.App.2d 563

**SASHIHARA et al. v. STATE BOARD OF
PHARMACY et al.**
Civ. 9892.

District Court of Appeal, Second District,
Division 2, California.

June 13, 1935.

1. Druggists Ⓒ2

Statute prohibiting aliens from registering as pharmacists, as applied to Japanese, *held* not invalid as conflicting with treaty extending to Japanese citizens right to carry on trade or own shop as if they were citizens of United States, since practice of pharmacy is a "profession" and not a "trade" (St. 1933, p. 2193, §§ 2, 3; Treaty of Commerce and Navigation between United States and Japan, art. 1, 37 Stat. 1504).

"Profession" means that of which one professes knowledge; the occupation, if not purely commercial, mechanical, agricultural, or the like, to which one devotes one's self; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others, or of serving them in some art; calling; vocation; employment; as the profession of arms; the profession of chemist. "Trade" is the business which a person has learned and which he engages in for procuring subsistence, profit, or occupation; especially mechanical employment as distinguished from the liberal arts, the learned professions, and agriculture; as we speak of the trade of a smith, of a carpenter, or mason, but not now of the trade of a farmer, or lawyer, or a physician.

2. Constitutional law Ⓒ215

Statute prohibiting aliens from registering as pharmacists, as applied to Japanese,

held not invalid as palpably arbitrary and abuse of police power and denying equal protection of the laws, where legislation was enacted for protection of public health, safety, and general welfare, and object and means adopted were reasonably related (St. 1933, p. 2192, §§ 2, 3).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for a writ of mandamus by Thomas T. Sashihara and others to be directed to State Board of Pharmacy and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Maurice Norcop, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondents.

CRAIL, Justice.

Plaintiffs petitioned for a writ of mandate to compel the California State Board of Pharmacy to permit them to take the examination for Licentiate in Pharmacy. The trial court sustained a general demurrer to the petition without leave to amend, and plaintiffs appeal therefrom.

It is admitted that the plaintiffs are not citizens and are ineligible to become citizens of the United States. Sections 2 and 3 of the Pharmacy Act St. 1905, p. 536, as amended by St. 1933, p. 2192, forbid the registration of all persons, irrespective of moral standing, training, qualifications, and experience, who are not "citizens of the United States," etc.

Plaintiffs contend first that sections 2 and 3 of the Pharmacy Act conflict with the terms and provisions of the Treaty of Commerce and Navigation between the United States and the nation of which petitioners are subjects, and are to that extent invalid; and, second, that said sections constitute an abuse of the police power and create an arbitrary and discriminatory classification and denies to such aliens the equal protection of the laws.

The pertinent part of such treaty reads as follows: "The citizens or subjects of each of the High Contracting Parties shall have liberty * * * to carry on trade, wholesale and retail, to own * * * shops * * * and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws

and regulations there established." Vol. 37 U. S. Statutes at Large, part 2, p. 1504, art. 1.

[1] The whole matter resolves itself down to the question: Is the occupation of being a pharmacist a trade or is it a profession? If the practice of pharmacy is a trade, the treaty is violated; if it is a profession, the treaty is not violated. In this connection we must keep in mind the distinction between the business or trade of a druggist as the owner or operator of a drug store and the practice of pharmacy as such. A pharmacist may compound prescriptions. While he is so doing he is exercising his knowledge of the science of pharmacy in compounding drugs; thereafter he or some one else may sell the medicine to a customer. If he does so, he becomes, in the doing of said act, a clerk or merchant. The statute which is under discussion does not prevent aliens from operating or owning drug stores or working as clerks therein; it merely prohibits them from being registered as pharmacists and from acting as such. Webster's New International Dictionary in defining the word "trade" says: "The business which a person has learned, and which he engages in, for procuring subsistence, or for profit; occupation; esp., mechanical employment as distinguished from the liberal arts, the learned professions and agriculture; as, we speak of the trade of a smith, of a carpenter, or mason, but not now of the trade of a farmer, or a lawyer, or a physician." In defining the word "profession" the same authority says: "That of which one professes knowledge; the occupation, if not purely commercial, mechanical, agricultural, or the like, to which one devotes one's self; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others or of serving them in some art; calling; vocation; employment; as the profession of arms; the profession of chemist." We are satisfied that the practice of pharmacy is a profession, and that the Pharmacy Act is not in violation of the referred to treaty.

[2] We are satisfied also that the object sought to be accomplished by the legislation in question is the protection of the public health, safety, and general welfare, and that there is a reasonable relation between that object and the means adopted. This court cannot say that the classification excluding aliens is "palpably arbitrary." In the practice of pharmacy, chemicals and

poisons are constantly used and compounded. If not handled with great caution, much harm might be inflicted. And it is obvious from these facts and others that there may be a reasonable basis for the existence of the discrimination against aliens, and therefore that the act under discussion is not an abuse of the police power. Neither do said sections deny to aliens the equal protection of the laws. See cases collected in 17 Cal. Law Review, p. 666, note.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 312

ROBINSON v. HARRY et al.

Civ. 5306.

District Court of Appeal, Third District,
California.

June 1, 1935.

Rehearing Denied July 1, 1935.

1. Agriculture ☞6

In action by assignee of payee of notes for security of which co-operative association accepted maker's assignment of interest in sacks of rice in association's custody, evidence held to sustain findings of trial court sitting without jury that loans represented by notes were made by payee in reliance on assignment of maker's interest in sacks of rice in possession of association.

2. Agriculture ☞6

As respects liability of co-operative association on notes for security of which association accepted maker's assignment of interest in sacks of rice in association's custody, association's certificate, "Assent to the within is hereby given, * * * including this order, together with such member's prior indebtedness to this association aggregates the sum of \$2,000.00," held complete ratification of assignment, and hence it was immaterial whether association's field manager had ostensible authority to bind association by his statements or his silence with respect to maker's indebtedness to association (Civ. Code, §§ 2307, 2310).

3. Principal and agent ☞122(1), 175(1)

Ostensible agency may not be established by declarations of agent, but such authorization must be proved by conduct or declarations of his principal, but, when obligation is subsequently ratified by principal, admission of evidence of ostensible authority of agent becomes immaterial (Civ. Code, §§ 2307, 2310).

4. Appeal and error ☞1050(1)

In action by assignee of payee of notes for security of which co-operative association accepted maker's assignment of interest in sacks of rice in association's custody, alleged error in admitting evidence of association's field manager's ostensible authority to assure payee that association would accept and ratify assignment held harmless, where association ratified assignment (Civ. Code, §§ 2307, 2310).

5. Payment ☞44

Where payee of notes accepted as security co-operative association's acceptance of maker's assignment of his interest in sacks of rice in association's custody, and subsequently loaned more money to maker and accepted as security warehouse receipts on other sacks of rice in association's custody, payee held authorized to apply proceeds of rice represented by warehouse receipts in payment of later loans, where subsequent loans constituted separate transaction and were distinct from original assignment, and payment was made without designation as to its application (Civ. Code, § 1479).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by J. B. Robinson against Alvin L. Harry and the Rice Growers Association of California. From a judgment for plaintiff, second named defendant appeals.

Affirmed.

George R. Freeman, of Willows, for appellant.

Seth Millington, of Gridley, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The Rice Growers Association of California, a co-operative marketing organization, has appealed from a judgment which was rendered against it in a suit upon two promissory notes which were executed by the codefendant Alvin L. Harry for the security of which the association accepted the owner's order and assignment of \$2,000 interest in 3,797

sacks of rice in its custody. The rice was subsequently sold by the association, but payment of the \$2,000 was refused.

The defendant Harry was a farmer and a member of the Rice Growers Association of California, a nonprofit, co-operative marketing organization. In November, 1927, Mr. Harry delivered to the association 3,797 sacks of rice which constituted the large portion of his crop of that season. These 3,797 sacks of rice were stored with the association, and joint warehouse receipts therefor were issued to it and to Alvin L. Harry. December 6, 1927, the defendant Harry, accompanied by Charles C. Johnson, field manager for the association, went to the Gridley branch of the Bank of America to arrange for a loan to be secured by an order on Harry's rice in the custody of the association. Mr. Harry was not then indebted to the bank. It later developed that he was indebted to the association for funds which had been advanced for the production of his rice crop for that season, at the rate of \$1.50 per sack, aggregating the sum of \$5,695.50, although J. R. Craig, the vice president and manager of the bank, with whom the loan was negotiated, testified that neither Mr. Harry nor Mr. Johnson told him of this indebtedness, and that the bank had no knowledge of its existence. There is, however, a conflict of evidence on that subject. Relying on the assurance that the association would approve and accept Mr. Harry's order and assignment of a \$2,000 interest in his rice which was then in the custody of the association, to secure the notes, the bank then agreed to make the loan. Mr. Harry then executed his note to the bank for the sum of \$1,000, which was credited to his account, and, as a part of the same transaction, he also executed a written order on the association and assignment of a \$2,000 interest in his rice in its custody, to secure the loan. This order and assignment was promptly presented to the association and approved and accepted by it the following day. The treasurer of the association certified that there was no prior indebtedness of Mr. Harry against the rice in his possession. That document reads as follows:

"To Rice Growers Association of California:

"Pay to Gridley Branch, Bank of Italy, Gridley, California, or order, \$2,000.00 two thousand dollars, from any sums that

are or may become due me by reason of delivery to you of the 1927 crop of rice under the terms of your certain contract of purchase with me, duly recorded, if, when and in the manner said sums are payable, except as such sums may be offset by indebtedness to you prior hereto or covered by orders to which you have previously assented. This constitutes an assignment to the extent of its terms of any claim I may have against you under the terms of the contract above mentioned. This assignment-order shall be ineffective until assented to in writing by the Rice Growers Association of California, and shall be paid only upon surrender of this original. This and all other orders against the said sums shall be given priority of payment in the order to which assent thereto is given.

"I certify that I have under actual cultivation and expect to harvest _____ acres of rice subject to the terms of the above mentioned contract and unincumbered other than by orders similar hereto.

"Dated December 6th, 1927.

"[Signed] Alvin L. Harry.

"Assent to the within is hereby given and certification made that the total amount of outstanding orders of this member to which assent has been given, including this order, together with such member's prior indebtedness to this association aggregates the sum of \$2,000.00.

"Dated, December 7, 1927.

"Rice Growers Association of California,
"By: T. A. Harris, Treasurer."

Relying on the preceding assignment and acceptance on the part of the association, the bank made a further loan of \$1,500 to Mr. Harry, on December 17, 1927, which was evidenced by his note of that date, payable March 15, 1928. It will be observed that this last note, together with the original \$1,000 note, exceeds the amount of the assigned security upon the 3,797 sacks of rice in the custody of the association. Subsequently Mr. Harry procured a further loan of \$300 from the bank. To secure this last-mentioned loan and \$500 of the second note, which was the amount in excess of the sum specified in the preceding assignment, Mr. Harry delivered to the bank his warehouse receipts and an assignment of 1,324 other sacks of rice. This second assignment was no part of the original transaction. The 1,324 sacks of rice were not in the ware-

house of the association when the original assignment was made. Our attention is not called to any evidence indicating that Mr. Harry was indebted to the association in any sum whatever on account of this last consignment of 1,324 sacks of rice, or that it had any claim upon this rice for money advanced to the owner. It is true that the bank turned the warehouse receipts for this last-mentioned rice over to the association, and that it subsequently sold that last-mentioned rice at the request of the bank, and paid to the bank the proceeds therefrom amounting to \$1,800. There is evidence that this payment of \$1,800 was derived solely from the sale of the 1,324 sacks of rice. Neither Mr. Harry nor the association made request of the bank with respect to the application of this payment. The bank, therefore, applied the payment of the \$1,800 according to the provisions of section 1479 of the Civil Code, first to the payment of the last loan of \$300, and then to the satisfaction of the \$500 excess of the second note beyond the original amount of the assignment, and the balance was applied to the payment of interest on the entire indebtedness, and the remainder was then prorated between the remaining notes, leaving unpaid on the first note the sum of \$375, and on the second note a balance of \$937, together with interest on both notes at 7 per cent. per annum from December 27, 1929.

The 3,797 sacks of rice, which were in the custody of the association at the time of the original loan, were subsequently sold by it for a sum in excess of the \$2,000 for which they were assigned as security. The defendant Harry defaulted in his obligations to pay the balance due on these two notes. They were assigned to the plaintiff, who, after demand upon the association for the payment thereof, brought suit against both Mr. Harry and the association, based upon the notes and the accepted assignment of the \$2,000 interest in the rice crop. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff on all the material issues which were involved. Judgment was rendered jointly against both defendants for the sum of \$1,723.76 and costs of suit. From that judgment the Rice Growers Association only has appealed.

On appeal it is contended the findings and judgment against the association are

not supported by the evidence, for the reason that the original loan was made before the assignment was accepted by the association and that the bank may therefore not be deemed to have made the loan in reliance upon the acceptance; it is claimed the second loan was not made in reliance upon the acceptance of the association; that the field manager Johnson was without authority to bind the association in his effort to assist a member thereof to procure loans; that the court erred in receiving in evidence statements of the officer Johnson in support of an alleged ostensible agency on his part; and that the bank had no authority to apply the payment of \$1,800 upon the obligations which were incurred subsequent to the association's acceptance of the assignment of Harry's interest in the rice crop.

[1,2] The findings of the court to the effect that the loans represented by the two promissory notes, for the unpaid balance of which judgment was rendered in this suit, were made by the bank in reliance on the order and assignment of the \$2,000 interest in defendant Harry's 3,797 sacks of rice in the possession of the association, is adequately supported by the evidence. The vice president of the bank, with whom the loan was negotiated, was assured that the association would accept the order and assignment which was executed by Harry at the same time and as a part of the same transaction of making the loan and executing the first note for \$1,000. This order and assignment was promptly presented to the association and unconditionally ratified and accepted by it on the following day. There is evidence that the bank did not then know that Mr. Harry was indebted to the association in any sum whatever, although that appears to be an immaterial fact. Indeed, the association certified that he was not indebted to it, by stating that "assent to the within is hereby given, * * * including this order, together with such member's prior indebtedness to this association aggregates the sum of \$2,000.00." This was a complete ratification of the order and assignment, and renders it immaterial whether the field manager Johnson had ostensible authority to bind the association by his statements or his silence with respect to the indebtedness of Harry. 2 Restatement of the Law of Agency, p. 641, § 284d.

[3] It is true that an ostensible agency may not be established by the declarations of the agent himself and, on the contrary, that his authorization must be proved by the conduct or declarations of his principal. 1 Cal. Jur. 741, § 41. But, when an obligation is subsequently ratified by the principal, the admission of evidence of the ostensible authority of the agent becomes immaterial and harmless. Section 2307 of the Civil Code provides: "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification."

Section 2310 of the Civil Code also provides: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

[4] We are therefore of the opinion that the admission of evidence of the field manager's ostensible authority to assure the bank that the association would accept and ratify the order and assignment was harmless.

Relying upon the previous ratification of the order and assignment, ten days thereafter the bank made a further loan to Mr. Harry of \$1,500, which was also secured, to the extent of \$1,000 thereof, by the former \$2,000 assignment of the owner's interest in 3,797 sacks of rice in the custody of the association. There can be no doubt of the association's liability on this second note to the extent of \$1,000 thereof.

[5] Within a few days after the second loan was made, the bank made a further advance to Mr. Harry of the sum of \$300. To secure this last-mentioned loan and the \$500 excess of the second note beyond the amount of the original \$2,000 lien on the rice in the custody of the association, the defendant Harry transferred to the bank his warehouse receipts for 1,324 other sacks of rice which were not in the possession of the association. This was a transaction separate and distinct from the original order and assignment upon which this action against the association is founded. This last allotment of rice was subsequently sold at the request of the bank by the association, and \$1,800 of the proceeds of that sale were paid to the

bank without any designation of the particular loans to which they desired it to be applied. Since this \$1,800 payment was derived from the sale of a separate allotment of rice and had no bearing upon the original order and assignment, and since it was made without designation as to its application, the bank was authorized under the provisions of section 1479 of the Civil Code, and did apply it to the payment of the last \$300 obligation, together with the \$500 excess amount of the second note and the accrued interest thereon. The balance of that \$1,800 payment was then applied *pro rata* to the two outstanding notes, leaving an unpaid balance of \$375 on the first note, and of \$937 on the second note, together with interest on both notes at 7 per cent. per annum from December 27, 1929. We are satisfied that the association is liable on its accepted and ratified order and assignment of the original 3,797 sacks of rice in its possession for the payment of the balance of these notes from the proceeds derived from the sale thereof.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



7 Cal.App.2d 457

**TAGUS RANCH CO. v. FIRST NAT.
BANK OF CLOVIS.**
Civ. 1349.

District Court of Appeal, Fourth District,
California.

June 7, 1935.

I. Husband and wife ☞ 126(2)

Bank to which husband was indebted having, upon husband's disappearance, acquiesced in and assisted, through means of loans, wife in taking over husband's sawmill, and in obtaining new permit from government to cut timber and a new contract with company with which husband was under contract to furnish trays *held* not entitled to apply check, which had been advanced to wife by company to enable her to complete contract, to payment of husband's debts, since money, even if not earned by wife, was at least an "accumulation" within meaning of statute providing that earnings and accumu-

lations of wife, while living separate from husband, are her separate property (Civ. Code, § 169).

[Ed. Note.—For other definitions of "Accumulate; Accumulation," see Words & Phrases.]

2. Husband and wife ⇨23¾

Wife, in taking over sawmill business of husband who had disappeared, and in depositing with bank check which had been advanced to wife by company with which wife had contract *held*, in absence of proof of such fact, not to have been acting as agent of husband so as to authorize application by bank of proceeds of check to payment of husband's debts, since there was no presumption of agency and burden of proof was upon bank.

3. Appeal and error ⇨762

In action against bank to recover proceeds of check issued to wife but applied by bank to payment of husband's debts, point raised by bank for first time in its final brief on appeal that wife, during time in question, was not living apart from husband within meaning of statute providing that earnings and accumulations of wife during such period were her separate property *held* raised too late (Civ. Code, § 169).

4. Husband and wife ⇨133(9)

In action against bank to recover proceeds of check issued to wife but applied by bank to payment of husband's debts, undisputed evidence that husband had disappeared, that wife had searched for him and had never been able to find him, and that he was still missing at time of trial *held* to sustain finding that during time in question wife was living apart from husband within statute providing that earnings and accumulations of wife during such period were her separate property (Civ. Code, § 169).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Tagus Ranch Company against the First National Bank of Clovis. Judgment for plaintiff, and defendant appeals.

Affirmed.

Arthur Frame, of Clovis, and Frank Kauke, of Fresno, for appellant.

Russell & Heid, of Tulare, for respondent.

BARNARD, Presiding Justice.

A. A. Reed and Laura J. Reed were husband and wife. He operated a small saw-

mill in the mountains, manufacturing shook and tray material. In July, 1932, he borrowed \$600 from the defendant on his note and used the same to purchase a tractor and other machinery from a garage for use in connection with the sawmill. Apparently the bank acquired the legal title to this machinery from the garage, and there is evidence that the garage took back the machinery from Reed, although the cashier of the bank testified that the bank never received it. In April, 1933, Reed entered into a contract with the plaintiff to supply to it certain trays. Thereafter he obtained from the bank a further loan in the sum of \$250 on his note, for the purpose of purchasing additional machinery for the mill. He obtained a permit from the government to cut certain timber and moved his sawmill to a certain point in Fresno county. Before the mill was set up, he disappeared, leaving his wife and child without means of support.

Laura J. Reed went to the defendant bank to inquire about her husband's affairs. Her testimony is that they told her little, that she knew the \$250 note was there, but that she thought the \$600 note had been paid by the return of the machinery. She informed the bank of her husband's disappearance, and that she intended to carry on the business in order to make a living for herself and child. On June 14, 1933, she told the defendant she needed money for groceries and to carry on the business, and it loaned her \$100 on her note. A new account was opened in her name and she was given a passbook. A number of deposits were made in this account, and a number of her checks were paid. About July 22, 1933, Mrs. Reed had an interview with the plaintiff as a result of which the plaintiff sent a check for \$750.56 to the defendant bank, payable to Mrs. Reed. On July 24, 1933, Mrs. Reed went to the bank, expecting the check to be there, and indorsed and deposited the same to her account. She testified, as to the reason why this money was furnished to her, that she had to have a larger engine at the plant in order to put out this material for the plaintiff and also wanted to pay up some labor and other things which were behind in connection with the mill. She also testified that she told the bank that she had gotten this money in order to straighten out and go ahead with the mill.

Without saying anything to Mrs. Reed in advance, the bank, on July 28, 1933, took the \$750.56 and applied the same on Mr. Reed's notes, sending Mrs. Reed a written notice that her account had been charged with that amount. Thereafter, Mrs. Reed assigned her claim to the plaintiff, and this action was brought to recover the amount thus taken by the defendant. The court found that the said Laura J. Reed, while living separate and apart from her husband, had earned and accumulated the said sum of \$750.56, that she deposited the same in the defendant bank in a separate account in her own name, that said fund was and is the separate property of the said Laura J. Reed, and that she was not liable for any indebtedness of her husband. From the judgment entered, the defendant has appealed.

[1] The appellant contends that the findings to the effect that this money was Mrs. Reed's separate property and not the community property of herself and her husband are not sustained by the evidence. In support thereof, *Schuyler v. Broughton*, 70 Cal. 282, 11 P. 719, and other cases, are cited, in which it has been held that where money is borrowed by a married woman and invested in real estate, and where the same is not secured by a lien on her separate property, the real property bought is community property. These cases are not very helpful here. Section 169 of the Civil Code provides that the earnings and accumulations of a wife, while living separate from her husband, are her separate property. In *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 P. 313, 315, Ann. Cas. 1912A, 567, the court said: "But, when he has left his family, has ceased to contribute to its support, and has abandoned his property to the use of his wife for that purpose, there is no consideration of public policy which prevents her from exercising the same powers and acquiring the same rights with respect to the property left in her hands as if she were an unmarried person. Our liberal statutes concerning the rights and powers of married women invest her with sufficient power to hold adversely to her husband. She may own, hold, and control her separate property as fully and completely as the husband can own and control his separate property. Civ. Code, § 162. Neither spouse has any interest in the separate property of the other. Civ. Code, § 157." In that case, which involved a claim of adverse possession on the part of the wife

as against the husband, the court, in discussing section 169 of the Civil Code, said: "The word 'earnings' according to its ordinary meaning would not apply to property acquired by adverse possession. But property so acquired and held in ownership would clearly be included in the term 'accumulations.' When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained. Of course, if it were acquired by the wife by purchase with community funds, or in exchange for other community property, it would not be accumulated in the sense here involved. Such an acquisition would be a mere exchange, and it would have the character possessed by that given in exchange for it. But where the wife, while living separate from her husband, through her own industry, labor, skill, or efforts of any kind, obtains property and holds it in possession, it is what would ordinarily be called an accumulation of property, and, under the rules stated in section 169, it would be a part of her separate estate."

It fully appears that Mrs. Reed was deserted by her husband and left without means of support for herself and child except for such property as there might have been in connection with the sawmill, which was in an involved state, to say the least. With the knowledge of the bank and with its consent, express or implied, Mrs. Reed made an entire change in the set-up and proceeded to try to operate the mill in order to make a living and in order to fulfill the contract which her husband had made with the respondent. She borrowed money from the bank and started a new account in her name, she procured a new contract from the respondent in place of the one her husband had held, she obtained a new permit to cut timber from the government in her name, she moved the sawmill, which had not been set up at the former place, to a new location in accordance with the new permit, and she operated the plant and delivered trays to the respondent under the new contract. Needing some cash with which to operate, she went to the respondent and secured this \$750.56, the check being made payable to her and sent to the bank. While the appellant's cashier testified that when he loaned her the \$100 upon her note something was said to the effect that checks received from the respondent should be applied by the bank on all of the notes, including those given

by her husband, this was denied by Mrs. Reed, who testified that at that time she told him that as checks came in from the respondent he could apply a percentage of the same upon her \$100 note until the same was paid. It is significant in this connection that some half-dozen checks came to the bank from the respondent, payable to Mrs. Reed, which she signed and deposited to her account, and that they took nothing from these smaller checks to apply on any note until this large check came in, when they took it all. Although nothing was said to her at the time she signed this check and deposited it in her account, four days later her account was charged with the amount of the check and payment was refused on checks which she had issued.

While Mrs. Reed stated in one part of her testimony that she borrowed this amount from the respondent, the court was justified in inferring from the entire testimony, and in fact it is the only reasonable inference that can be drawn therefrom, that this amount was paid by the respondent to Mrs. Reed as an advance in order to enable her to furnish the trays in accordance with the contract. The bank had full knowledge of all of this, and in fact encouraged her to go ahead with her arrangements to operate the plant, and assisted her in doing so, and immediately after she secured this money which would have enabled her to proceed, it was all taken and applied to her husband's debts, making it impossible for her to go on or to complete the very contract for which the money was advanced and through which it was obtained. To permit the bank to keep this money is neither in accord with justice nor required by any rule of law. If this money was not earned by Mrs. Reed, it is at least such an accumulation as comes within the Code section, and, in our opinion, the essential findings are supported by the evidence. *Union Oil Company v. Stewart*, *supra*; *Street v. Bertolone*, 193 Cal. 751, 226 P. 913.

[2] Some claim is made that Mrs. Reed was acting merely as the agent of her husband in this transaction. There was no presumption to this effect, no proof of such a fact was offered, although the burden rested upon the appellant (*Schwarze v. Mahoney*, 97 Cal. 131, 31 P. 908), and the evidence justified the court in arriving at a contrary conclusion.

[3, 4] In its final brief, the appellant for the first time raises the point that the evidence does not sufficiently show that Mrs. Reed was, during the time in question, living separate and apart from her husband. Not only is the point raised too late, but the undisputed evidence to the effect that her husband had disappeared, that he had never been heard from, that she had searched for him and had never been able to find him, and that he was still missing at the time of the trial, with the reasonable inferences therefrom, is sufficient to support the finding.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 544

DEIKE v. EAST BAY ST. RYS., Limited, et al.

Civ. 9739.

District Court of Appeal, First District,
Division 1, California.

June 13, 1935.

Rehearing Denied July 13, 1935.

1. Trial ☞139(1)

To justify directing verdict, there must be entire lack of substantial evidence to sustain jury's verdict or to warrant Court of Appeal in sustaining such verdict.

2. Street railroads ☞98(9)

Pedestrian approaching diagonal street car crossing over sidewalk when it was dark and he could see only 102 feet, who looked over his shoulder, and, seeing no street car, traveled approximately 90 feet without again looking for approaching car, and did not see car which struck him until it was practically in collision with him, held contributorily negligent as matter of law.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Edwin Deike against the East Bay Street Railways, Limited, and another. From a judgment for defendants on directed verdict, plaintiff appeals.

Affirmed.

Edward J. Jose, of San Francisco, for appellant.

Chapman, Trefethen & Chapman and Frank S. Richards, all of Oakland, for respondents.

BURROUGHS, Justice pro tem.

This is an action for personal injuries alleged to have been suffered by the plaintiff as the result of the negligent operation of a street car owned by the defendant company and under the immediate control of its codefendant Hayden. At the close of the evidence, the court directed the jury to return a verdict for both defendants, which direction having been complied with, judgment was entered for defendants, and the plaintiff has appealed therefrom. The court directed the verdict in favor of the defendants on the ground that plaintiff was as a matter of law guilty of contributory negligence which was the proximate cause of the accident. It is the contention of the appellant that the question of plaintiff's negligence was one of fact to be determined by the jury. The limits within which the trial court may exercise its power to direct a verdict have been definitely fixed and determined by decisions of comparatively recent rendition by both the appellate and Supreme Courts of this state.

In *Re Estate of Caspar*, 172 Cal. 147, 149, 150, 155 P. 631, 632, it is said: "The right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given."

In *Diamond v. Weyerhaeuser*, 178 Cal. 540, 542, 174 P. 38, 39, the court said: "The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In *Re Estate of Lances*, 216 Cal. 397, at page 401, 14 P.(2d) 768, 769, in speaking of the power of the court to direct a verdict, the Supreme Court said: "In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict."

In *Re Estate of Henry C. Finkler*, Deceased, 46 P.(2d) 149, is the latest expression of our Supreme Court which we have been able to find as to the power of the trial court to direct a verdict. At page 151 it cites with approval the following from the *Estate of Sharon*, 179 Cal. 447, 459, 177 P. 283, 288: "'It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.'"

[1] There are many other cases cited by counsel, but they are, generally speaking, cumulative of the rule expressed in the above cases, which is, that to justify the trial court in granting a motion for a directed verdict there must be an entire lack of substantial evidence to sustain a verdict by a trial jury, or to warrant a court of appeals in sustaining such a verdict on appeal therefrom. The greatest difficulty encountered is to differentiate between what may in a given case constitute substantial evidence under the rule of law above cited.

[2] The evidence in the case at bar develops the following undisputed facts: East Eighteenth street in the city of Oakland runs in a generally easterly and westerly direction, and Third and Fourth avenues in said city intersect said East Eighteenth street at approximately right angles and run in a generally northerly and southerly direction. The defendant East Bay Street Railways, Limited, operates a part of its street car system over a portion of said East Eighteenth street. On the south side of the last-named street, between Third and Fourth avenues, there is a private right of way where the double tracks of said East Bay Street Railways leave East Eighteenth street and enter said private right of way, and at the time of the accident hereinafter

referred to it was used by the defendant company for the passage of its street cars in proceeding easterly from the heart of Oakland to the eastern portion of said city, and also in operating its street cars from the easterly portion of said city in a westerly direction to the business center of said city. Street cars proceeding westerly on East Eighteenth street from a point slightly west of Fourth avenue turn on a gradual turn to the left and across the sidewalk area on the south side of East Eighteenth street and into the right of way above referred to; street cars going east pass through said right of way and then turn to the right in a very gradual turn into East Eighteenth street and thence along the tracks situate thereon. There is a cement sidewalk on the south side of East Eighteenth street and the sidewalk space or area extending across the right of way is filled with bitumen or asphalt, substantially even with the cement sidewalk on each side thereof, and also extending out into East Eighteenth street at the approximate level of said street. This asphalt or bitumen pavement at the line of the sidewalk is approximately 135 feet in length along the line of said sidewalk. In other words, the two ends of the cement pavement or sidewalk immediately adjacent to said bitumen or asphalt to the east and west thereof respectively are approximately 135 feet apart, and in the intervening space is the asphalt or bitumen pavement above referred to, and over and across which pedestrians walking along the southerly line of said East Eighteenth street were accustomed to pass.

The plaintiff testified that at about 6:45 a. m. on the 23d of January, 1934, he was walking on the sidewalk on the south side of East Eighteenth street, between Third and Fourth avenues, in a westerly direction; that the street was wet and it was dark; that when he arrived at the point where he started to cross the right of way from the sidewalk, he looked back over his shoulder and saw no car approaching from the east, and that he proceeded a few steps and glanced in a westerly direction down the right of way and saw no car approaching from that direction. According to the diagram in evidence which is drawn to scale, and after plaintiff's attention was called to the scale, he placed a cross on the diagram, which point is approximately 35 feet from the first rail of the eastbound car track and approximately 90 feet from the most easterly rail of the westbound car track, marking the place where he stopped to look. He

further testified that he had crossed the easterly track and was about to cross the west track when he seemed to sense something behind him and he glanced back and there was a street car's headlight just back of his elbow; that he attempted to jump, but was struck. He states further that he stepped over the first rail of the westerly track and was not quite in the middle of the sidewalk or passageway when he saw the headlight of the street car. He further stated that seeing the headlight was the first knowledge he had that a street car was coming from that direction; that he did not know what attracted his attention to the street car; that he just suddenly became aware of it; that he heard no warning gong of any kind; that upon seeing the headlight he just attempted to jump to his left, but the car was within 3 or 4 feet of him when he first saw it and it was moving fairly fast; that he did not have time to jump. He further testified that during the full month of December and during all of the month of January, 1934, up to the 23d day thereof, being the day of the accident, he had been accustomed to take the same course each morning in going to his train; that his faculties of sight and hearing were good, and that he had been living in the vicinity of the accident for approximately two months prior thereto; that he had been in the habit of walking down the south side of East Eighteenth street towards the point of the accident; that he had observed before the date of the accident that street cars went in and out of said right of way; that he was conscious of the fact that street cars coming from the east down to the Key Route Station passed along the rails indicated and above referred to, and that also street cars going east passed along the above-referred to track; that he did not at any time from the time he left the point on the south sidewalk until the time when he saw the flash of light over his shoulder again look back; that when he looked over his shoulder, as first stated, he looked to see if there was a car in that block; that he was not able to judge of the speed of the street car; that it happened so quickly he did not have time to think about it; that it was almost instantly after he saw the street car that he was struck, simply a fraction of a second; that he thought he got out between the rails of the track upon which he was struck. There was no testimony as to whether or not plaintiff was struck by the front end of the car. The plaintiff further testified that after the car stopped he

was behind the street car trucks; that he did not claim that he went under the front trucks or that the wheels of the car went over him. He further testified that before the accident, and when he was east of Fourth avenue, he saw the train he was to take stop just north of East Eighteenth street on Third avenue; that the street car which struck him was lighted; that there was a very dim headlight on the street car; that he had observed the habits of street cars in going in and coming out of the right of way and that they usually rang a bell or gong before entering or leaving the right of way; that they usually went slowly. He then testified that it was rather a dangerous crossing; that at the time he looked over his shoulder behind him he did not observe anything within his range of vision that made him believe it would be unsafe for him to proceed across the car tracks, and that he imagined his glance would cover back to the corner of Fourth avenue, almost; that the purpose of his glancing back was to see if there was any moving street car in that block, and, upon seeing none, he assumed it was safe to proceed. An examination of the map discloses that the length of the block from where plaintiff looked east, to the end of the block, is approximately 100 feet. There is other evidence in the record which in some instances contradicts the testimony of plaintiff, but as we are not permitted to weigh or consider conflicting evidence upon a motion of this character the foregoing evidence of plaintiff is accepted as true. It is therefore certain that the defendant company and its codefendant were guilty of negligence in the operation of the street car at the crossing without sounding a warning, and that such negligence was a proximate cause of the accident. Indeed, this is not disputed. Now, coming to a consideration of the conduct of plaintiff, it appears that at the time he started to cross the right of way of defendant railway company he looked over his shoulder in the direction from which the car that struck him would be expected and he could see to about the corner of Fourth avenue, a distance of about 100 feet, and he did not see any car. From this point he walked without again looking in the direction from which a car was to be expected, across the eastbound car track and to the south rail of the westbound car track, a distance of about 90 feet, where he suddenly became aware, as heretofore stated, of the proximity of the car being operated by the defendant and within a few feet of him and was struck immediately.

In *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 476, 186 P. 631, 632, it is said: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away. In the exercise of ordinary care it is the duty of a pedestrian 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction.'"

In *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031, 1034, a pedestrian and an automobile collided on a public street. The trial court directed a verdict for the defendant because of the contributory negligence of decedent, which negligence was a proximate cause of the accident. The Supreme Court, in denying a hearing, said of the conduct of the plaintiff: "He was crossing the street at the time, and it was a part of his duty to use such reasonable ordinary care as the conditions demanded to see passing vehicles and avoid colliding with them. *Niosi v. Empire Steam Laundry*, 117 Cal. [257] 260, 49 P. 185; *Scott v. San Bernardino, etc., Co.*, 152 Cal. [604] 610, 93 P. 677. A failure by him to exercise such ordinary care would be negligence on his part."

In *Bailey v. Market Street C. Ry. Co.*, 110 Cal. 320, 328, 42 P. 914, 917, it is said: "The citizen, if upon the track, must leave it when the car approaches. If about to cross it, he must use his senses of sight and hearing before stepping on the track, to ascertain whether a car is approaching, and, in the absence of some well-known custom or regulation at crossings which renders such a precaution on his part unnecessary, he is guilty of negligence if he fails to look before he passes upon the track; and if all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt, it is negligence in law."

In *Schooley v. Fresno Traction Co.*, 56 Cal. App. 705, 206 P. 481, which was an action for damages for personal injuries, it was held that where a foot passenger walks or steps in front of an approaching street car and is struck the instant he sets his foot between the rails, there is but one inference that can reasonably be drawn from that fact, and that is, the inference of contributory negligence.

In the light of these decisions, it appears in the case at bar without conflict or contra-

diction that when plaintiff left the place of safety on the sidewalk and started diagonally across the street car tracks on East Eighteenth street, he looked over his shoulder to the east, a point from which cars were to be expected, and, seeing no street car, he traveled approximately 90 feet without again looking for approaching cars, and did not see the car until it was practically in collision with him. Had he used ordinary care or caution, he would have looked for approaching cars during his walk across the right of way and thus would have at least seen the light on the car and have avoided the accident. He said that it was a dangerous crossing; that it was dark and he could see only from the point where he started to cross the street to the corner of Fourth avenue (a distance of about 102 feet). With a knowledge of all of these facts, his conduct amounted to contributory negligence as a matter of law, which negligence proximately contributed to the accident. The judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



8 Cal.App.2d 127

KELSEY v. UYENO et al.

Clv. 10286.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

Appeal and error ⇨ 1008(1)

Evidence whether motorist who collided with ambulance which crossed intersection after traffic signals had changed against it heard ambulance siren, or as reasonable man in exercise of ordinary care should have heard it, and whether his conduct was reasonable and cautious, *held* for trial court.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Fay Kelsey, a minor, by Sam F. Kelsey, her guardian ad litem, and another against K. Uyeno and others, where-

in the named defendant filed a cross-complaint. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Clarence B. Runkle, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Defendant Uyeno appeals from judgment for plaintiff which was rendered against him together with certain codefendants who have not appeared.

Plaintiff Fay Kelsey was being driven in an ambulance as a passenger for hire, going west on Whittier boulevard in Los Angeles. The car passed through the intersection of that boulevard with Boyle avenue just after the signals had changed to "Go" for north and south bound traffic on the latter thoroughfare. Defendant started south in his sedan and ran into the right rear side of the ambulance, causing the injuries to said plaintiff of which complaint is made.

The negligence of the ambulance owners and the operator, who are codefendants, is conceded by the parties to this appeal. Appellant contends that the evidence is insufficient to establish that he was negligent. He was going about ten miles per hour as he crossed the intersection, and claims he did not hear any siren or see the ambulance until it was too late to avoid an accident. There was evidence, however, that the siren was sounding continuously as the ambulance approached the intersection and entered it at a speed variously estimated from twenty miles per hour to more than twice that rate. The questions whether appellant heard the siren, or as a reasonable man in the exercise of ordinary care should have heard it, and whether his conduct was reasonable and cautious under the circumstances as shown by the evidence, were for the trial court to determine. The finding that appellant was negligent is supported by the evidence.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

8 Cal.App.2d 135

PEOPLE v. WILEY et al.
Cr. 2719.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

1. Burglary ☞42(1)

Where a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.

2. Burglary ☞41(1)

Evidence held to support conviction of second degree burglary.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lemmie Wiley and Elmo W. Wiley were convicted of second degree burglary, and they appeal.

Affirmed.

W. Thomas Davis, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants were convicted by a jury of second degree burglary, and on this appeal declare that the evidence is insufficient to sustain such conviction.

[1,2] The household furniture of the complaining witness was stolen from an unoccupied residence where it was stored. It was later found in the possession of the two defendants; a portion of it being at the home of each. Defendant Lemmie Wiley was seen riding on a truck hauling furniture to his residence. When arrested, he told the officers of meeting a stranger and of storing the furniture for him, and testified to a somewhat different set of circumstances at the trial. Defendant Elmo W. Wiley stated to the officers that he and Lemmie had bought the furniture from one "Jimmie Jones," and testified to that effect at the trial producing a receipt alleged to have been received from that party. He gave an exemplar of handwriting which the jury compared with the receipt, in each of which the name was

spelled "Jemmie Johns," and furniture was spelled "funiture."

Where a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. *People v. Cataline*, 54 Cal. App. 36, 200 P. 1060; *People v. Gibson*, 16 Cal. App. 347, 116 P. 987; *People v. Swanson*, 120 Cal. App. 173, at page 176, 7 P.(2d) 380. The inconsistencies and contradictions in the declarations and testimony of each defendant herein afford ample evidence to support the determination by the jury of their guilt of the crime of which they were convicted.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 22

URBANO v. MARKET ST. RY. CO.
Civ. 9193.

District Court of Appeal, First District,
Division 1, California.

June 25, 1935.

Rehearing Denied July 25, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Appeal and error ☞930(1)

Upon appeal of judgment based upon conflicting evidence, all conflicts must be resolved in respondent's favor, and all legitimate and reasonable inferences must be indulged in to uphold verdict.

2. Appeal and error ☞989

When verdict is attacked as being unsupported by evidence appellate court's power begins and ends with determining whether there is substantial evidence to support jury's conclusions.

3. Appeal and error ☞996

When two or more inferences can be reasonably deducted from facts, reviewing court is without power to substitute its deductions for those of trial court.

4. Appeal and error ☞996

To establish defense of contributory negligence as against jury's verdict, evidence must be such that appellate court can say there is no substantial conflict therein and that from facts court can reasonably draw but one inference pointing unerringly to

plaintiff's negligence as proximately contributing to injury.

5. Street railroads ☞101

Motorcyclist entering street intersection at 14 miles per hour without seeing approaching street car until within 25 feet of car and failing to stop when he saw that street car was continuing across intersection and turning right into side of car instead of left in direction in which car was traveling held negligent as matter of law so as to preclude recovery.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Suit by Anthony G. Urbano, Jr., against the Market Street Railway Company. From a judgment for plaintiff, defendant appeals.

Reversed.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellant.

Elmer P. Delany, of San Francisco, for respondent.

PER CURIAM.

This is an appeal by the defendant from a judgment in favor of the plaintiff for injuries received in an accident growing out of a collision between a street car operated by the defendant company and a motorcycle operated by the plaintiff. The major contention of the defendant is that the evidence clearly establishes, as a matter of law, plaintiff's contributory negligence.

[1-4] In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible. It is an elementary principle of law that when the verdict is attacked as being unsupported, the power of the appellate court begins and ends with determining whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Wing v. Kishi*, 92 Cal. App. 495, 268 P. 483. To establish the defense

of contributory negligence as against a verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict; that from the facts the court can reasonably draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his injury. *Green v. Southern Pacific Company*, 53 Cal. App. 194, 199 P. 1059; *Carey v. Pacific Gas & Electric Company*, 75 Cal. App. 129, 242 P. 97; *Wing v. Western Pacific R. R. Co.*, 41 Cal. App. 251, 182 P. 969. We therefore must construe the evidence bearing upon the issue of contributory negligence of the plaintiff in the light most favorable to plaintiff.

Keeping these well-settled rules in mind, we now turn to a review of the evidence. Defendant operates a single track railway along Clay street and across Stockton street in the city and county of San Francisco. Traveling from Powell street to Stockton street the cable cars on this line descend a 15 per cent. grade in an easterly direction on Clay street to a grade crossing located at the intersection of Clay and Stockton streets. The cable speed is 8 miles an hour. Along Stockton street the city and county of San Francisco operates a double track street railroad running in a northerly and southerly direction. On March 24, 1929, at about the hour of 9:30 a. m., the plaintiff was operating a motorcycle in a southerly direction on Stockton street towards this grade crossing. A companion of plaintiff, a young lady, was riding on a cushion on the rear fender of the motorcycle. The day was bright and clear and the streets were dry. When the plaintiff reached Clay street, his motorcycle collided with the left side of an eastbound Clay street cable car. The plaintiff is a messenger employed by the Western Union Telegraph Company. He had been a resident of the city and county of San Francisco for several years and was familiar with this intersection. Just before the collision, as plaintiff proceeded south on Stockton street across Clay street, he was traveling along a line parallel to the westerly curb line of Stockton street and 3 or 4 feet to the east thereof. Plaintiff admitted he did not see the car until he reached the north property line of Clay street, and from there that he saw for the first time, he testified, the front end of the car which was from 4 to 6 feet to the west of the westerly property line of Stockton

street; that the car was moving slowly, at a speed of 6 or 8 miles per hour; that his brakes were in good condition, and under the conditions there prevailing he could stop his motorcycle in 10 or 12 feet; that he did not apply his brakes or attempt to slow up the motorcycle, but continued at 12 to 14 miles an hour until he was midway between the north curb line of Clay street and the northerly rail of the Clay street car track; that at this point he saw the car driving into the intersection; that it seemed to him to pick up speed; that for the first time he realized the danger of collision if he continued on his intended course in front of the car; that he then suddenly turned his motorcycle in a westerly direction up Clay street towards Powell street; that he was never in the path of the car; that he was not struck by the truck of the car; that after he had thus turned to the right up Clay street, and when he had reached a point 2 or 3 feet west of the curb line of Stockton street, the left handlebar of his motorcycle struck the side of the car at a point some 10 feet to the rear of the front of the car. The plaintiff admits that his motorcycle collided with the front part of the inclosed section of the cable car. Plaintiff, the evidence shows, from the time he saw the car until the collision occurred, traveled a distance of not less than 25 feet. Instead of applying his brakes and stopping within 25 feet, plaintiff turned his motorcycle up the hill to avoid colliding with the cable car. At the time plaintiff turned his motorcycle up the hill to avoid the car, plaintiff's lady companion was seated on the rear fender of his motorcycle. Appellant contends that plaintiff's failure to stop his motorcycle under such circumstances, the speed at which he entered the intersection, his failure to turn to the left, in the direction in which the car was traveling, and his failure to exercise care to look for the approach of this car, constituted negligence as a matter of law.

Conduct such as that admitted by plaintiff has been held to constitute negligence as a matter of law. In *Hamilton v. Birmingham, etc., Co.*, 198 Ala. 630, 73 So. 950, 951, the court said: "We do not mean to say or hold that there was any evidence on the part of the defendant as to original or initial negligence; but, even if such were the case, it clearly and indisputably appears that the plaintiff was guilty of negligence which proximately contributed to his own injury, in that after the mo-

tor car, or the front end of it, had passed his motorcycle with safety to him, he drove, or allowed his motorcycle to approach, too near the street cars, thereby causing the collision resulting in his injury."

In *Westcott v. Waterloo, etc., Ry. Co.*, 173 Iowa, 355, 155 N. W. 255, 258, the court in a similar state of facts said: "When he discovered the car, he turned abruptly to the east and collided with the car at a point opposite the front trucks. Defendant's car, if not at, was very close to, Second street when the deceased first looked up. He did not slacken his speed or change his crouching position upon the motorcycle. Nothing that defendant could have done after discovering his position could have avoided the collision. The plaintiff has not only failed to show freedom from contributory negligence, but we think that the record affirmatively shows such contributory negligence on deceased's part, such want of care for his own safety, as precludes recovery in this case." In *Sharpe v. Public Service Ry. Co.* (1927) 103 N. J. Law, 583, 137 A. 526, 528, the court said: "The trolley car with which the plaintiff collided had nearly crossed the intersecting New street, and the motorcycle struck the trolley near the rear end. The slightest observance at a proper time of the conditions before him would have indicated the dangerous situation presented, and it was the want of this observance, together with heedless proceeding in the face of danger, which in part at least brought to the plaintiff his misfortune."

In the case at bar, plaintiff's testimony further shows that the cable car was in his plain view, had he taken care to look along the lines of possible vision as he approached Clay street. Plaintiff, by his own admissions, saw the car. The cable car was in plain view during the time respondent was traveling the last 40 feet prior to reaching the north property line of Clay street. In *Cate v. Fresno Traction Company*, 213 Cal. 190, 2 P.(2d) 364, 366, the court said: "'The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing.'" *Young v. Southern Pacific Co.*, 189 Cal. 746, 754, 210 P. 259, 262. Therefore, if he looked for a car he must have seen it, and, in deliberately driving his machine upon the car track with the car approaching, Bruce was guilty of negligence of the most extreme char-

acter." Since it is admitted that the respondent did not see the street car until he reached the north property line of Clay street, the conclusion is irresistible that respondent did not exercise ordinary care to maintain a lookout as he approached the north property line of Clay street.

[5] Respondent's failure to stop his motorcycle under circumstances such as outlined in the testimony in this case, the speed with which he entered the intersection, his failure to turn to the left in the direction that the cable car was traveling, his turning to the right into the side of the car, and his failure to exercise care to look for the approach of a cable car, constitute negligence as a matter of law, contributing to the happening of the accident. Defendant was therefore entitled to a directed verdict. The judgment is reversed.



7 Cal.App.2d 578

SMEDBERG et al. v. BEVILLOCKWAY.

Civ. 9811.

District Court of Appeal, First District,
Division 2, California.

June 14, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Husband and wife ⇨270(7)

Judgment creditor's complaint against bankrupt judgment debtor's husband to impress lien upon community property in possession of husband *held* demurrable, where complaint was in nature of a creditor's bill, and did not state facts showing that judgment creditor had exhausted his legal remedies.

2. Husband and wife ⇨270(2)

Judgment creditor *held* not entitled to maintain action against bankrupt judgment debtor's husband to impress lien upon community property in husband's possession, since judgment creditor's alleged right devolved on trustee in bankruptcy, who was sole party in interest, to commence actions in behalf of bankrupt estate.

3. Husband and wife ⇨267(2), 269

Wife cannot convey her interest in community property except to her husband, and such interest is not subject to attachment nor to sale under writ of execution (Civ. Code, §§ 146, 158, 167).

4. Bankruptcy ⇨279

Trustee in bankruptcy *held* not entitled to maintain action against bankrupt's husband to subject community property in his possession to payment of judgment against bankrupt, since neither spouse can force division of community property except as collateral issue in divorce proceeding, and trustee had no better title or right in property than bankrupt (Civ. Code, §§ 146, 158, 167, 171a; Bankr. Act, § 70a (5), 11 USCA § 110 (a) (5)).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Esther Smedberg, as trustee in bankruptcy of Margaret Bevillockway, and another against Arthur H. Bevillockway. From a judgment after sustaining a general demurrer to plaintiffs' complaint, plaintiffs appeal.

Affirmed.

Marvin Sherwin, of Oakland, for appellants.

Torregano & Stark, of San Francisco (August B. Rothschild, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

To the first count contained in plaintiffs' amended complaint, the trial court sustained a general demurrer and at the same time denied the plaintiffs the right to amend. From the judgment entered thereon, the plaintiffs have appealed.

In the count to which the demurrer was sustained, the plaintiffs alleged that the defendant is the husband of Margaret Bevillockway; that on January 25, 1933, the plaintiff H. A. Brooks obtained a judgment against Margaret Bevillockway in the sum of \$8,837.35 for damages arising out of an automobile accident; that on June 8, 1933, Margaret Bevillockway filed a voluntary petition in bankruptcy, was adjudged a bankrupt, and Esther Smedberg was appointed trustee; that H. A. Brooks presented and proved his claim; that Arthur Bevillockway and Margaret Bevillockway owned community property which is in the possession of the defendant; that a part of said property was acquired by said community prior to July 29, 1927; that a part was acquired subsequently and prior to June 8, 1933; and that a part was acquired after June 8, 1933; that in the bankruptcy proceedings claims have been proved in the sum of \$9,005.35; and that the assets in the hands of the trustee

tee amount to \$20 and no more. The allegations are followed by a prayer that the court determine (1) the amount of the community property in the possession of the defendant which was acquired after July 29, 1927, and prior to June 8, 1933, and order the defendant to deliver one-half thereof to Esther Smedberg; and (2) that the court determine (a) the amount acquired between July 29, 1927, and June 8, 1933, and order defendant to deliver to plaintiffs one-half thereof, and (b) the amount acquired before July 29, 1927, and the amount acquired after June 8, 1933, and impress a lien thereon.

[1,2] As the rights of the two plaintiffs are not necessarily the same, we will discuss the case separately as presented by each plaintiff. The pleading was as to the plaintiff H. A. Brooks, in the nature of a creditor's bill; but the pleading does not purport to state any facts showing that the plaintiff H. A. Brooks has exhausted his legal remedies. Therefore, it is insufficient as to this plaintiff. *Matteson, etc., Mfg. Co. v. Conley*, 144 Cal. 483, 77 P. 1042. If it be claimed that because the defendant has filed a petition in bankruptcy this plaintiff was thereby excused from pursuing his legal remedies because they were unavailing (*Shafer v. Fisher*, 85 Cal. App. 43, 258 P. 651), the claim carries him out of court, because it then becomes manifest that any right he had has devolved on the trustee in the bankruptcy proceedings. 7 C. J. 113. Thereafter, the trustee in bankruptcy was the sole party in interest to commence and maintain actions in behalf of the bankrupt estate. 7 C. J. 260.

[3] We come now to consider the case as made by the plaintiff Esther Smedberg, as trustee in bankruptcy. As set forth in the complaint filed by her, the claim runs to one-half of the community property of Mr. and Mrs. Bevilockway accumulated (1) after July 29, 1927, and prior to June 8, 1933, and (2) the impressing of a lien on that acquired prior to July 29, 1927, and that acquired subsequent to June 8, 1933. But it is not claimed that either before or after the enactment of section 161a of the Civil Code the community property or the separate property of the husband was liable for the contracts of the wife made after marriage unless secured by a pledge or mortgage thereof executed by the husband. The statute provides it was not. Civ. Code, § 167. But this plaintiff does claim that the wife's interest in the community property is liable

for the wife's torts, and the plaintiff seeks to so charge that portion of the community property. In other words, the trustee seeks to force a division, whether operative now or in the future. The judgment above mentioned in favor of H. A. Brooks was rendered in an action maintained under section 171a of the Civil Code. It is as follows: "For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." That the liability under said judgment was not against both husband and wife nor was it against the husband is clear. We do not understand the plaintiffs to contend to the contrary. However, as above stated, the plaintiffs seek to hold the wife's interest in the community property in liquidation of said judgment. Can it be so segregated and applied? At the instance of the wife her interest could be segregated by a mutual contract between her and her husband (Civ. Code, § 158); or in a divorce action (Civ. Code, § 146); or a separate action based on a divorce action (*De Godey v. Godey*, 39 Cal. 157); or, on her death, by reason of the provisions of her will. Probate Code, § 201. Our statutes provide no other methods. There are authorities to the effect that neither husband nor wife, except as we have recited, can force a division of the community property by partition (*Freeman on Partition and Cotenancy*, § 445), nor by a proceeding in equity. *Martin v. Martin* (Tex. Com. App.) 17 S.W.(2d) 789. In the case of *In re Landis* (C. C. A.) 41 F.(2d) 700, 702, the court quoted from section 70 of the Bankruptcy Act as follows:

"(a) The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * *

"(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." USCA, title 11, § 110 (a) (5)."

And then it said: "The property which passes to the trustee in all such cases is governed primarily by the federal statute previously set forth herein. It specifies two classes of property of the bankrupt which, by operation of law is vested in the trustee: viz., (1) all property which, prior to the filing of the petition, the bankrupt could

any means have transferred; (2) all property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against him. In determining what property falls within these classes we are to be governed by the laws of Illinois, due to the fact that the trust was created, and is being administered, and the property involved is situated in that state. In re Twaddell (D. C.) 110 F. 145; In re Moore (D. C.) 22 F.(2d) 432."

Now under the laws of California, except to her husband, a wife may not convey her interest in the community property. Peiser v. Griffin, 125 Cal. 9, 12, 57 P. 690; Tryon v. Sutton, 13 Cal. 490, 493; Landers v. Bolton, 26 Cal. 393, 420. As she may not dispose of her interest, the same is not subject to attachment. Howell v. Foster, 65 Cal. 169, 3 P. 647. Nor is it subject to sale under a writ of execution. Freeman on Executions, § 172b.

[4] Moreover, we have shown above under the laws of this state neither spouse can force a division of the community property except as a collateral issue in a divorce proceeding. That being so, the trustee in the bankruptcy proceedings of one of the spouses cannot do so, because such trustee has no better title or right in property than the bankrupt himself. In re Place (D. C.) 224 F. 778.

It will be conceded at once that far more protecting guards have been placed by the Legislature about the community property of husband and wife than about the interests of tenants in common. Furthermore, that portion of the Bankruptcy Act which we have quoted above was a part of that statute when it was enacted in 1898. Other portions of the act have been amended from time to time. But the passage quoted has been continued down to date. However, as early as 1908, the Supreme Court of Florida held that a trustee in bankruptcy could not maintain a partition proceeding against tenants in common. Hobbs v. Frazier, 56 Fla. 796, 47 So. 929, 20 L. R. A. (N. S.) 105, 131 Am. St. Rep. 179, 16 Ann. Cas. 558. In the year 1910, the Supreme Court of Ohio rendered a similar decision. Lindsay v. Runkle, 82 Ohio St. 325, 92 N. E. 489, 29 L. R. A. (N. S.) 659, 137 Am. St. Rep. 781. Nevertheless, no amendment to the statute has been made enlarging the powers of the trustee in such matters. While the instant case is not a proceeding in parti-

tion, it will not be denied that it would have the same general effect.

Under the common law there existed what were known as estates by entireties. 30 C. J. 564. They exist in several of our sister states. They have many characteristics in common with the estate in California which we call community property. A comparison (30 C. J. 564 and 31 C. J. 79) shows they differ in only a few characteristics, no one of which is important so far as the rights and duties of a trustee in bankruptcy are concerned. However, it has been held that on the bankruptcy of one spouse his or her trustee in bankruptcy takes no title to an estate by the entirety. 7 C. J. 116; In re Berry (D. C.) 247 F. 700, 706; McMullen v. Zabawski (D. C.) 283 F. 552, 556. "Where the reason is the same, the rule should be the same." Civ. Code, § 3511.

For each of the reasons which we have stated above, we think it is clear the plaintiff, Esther Smedberg, as trustee in bankruptcy, was not authorized to maintain this action.

The judgment appealed from is affirmed.

We concur: **NOURSE, P. J.;**
SPENCE, J.



7 Cal.App.2d 604

MEYER et al. v. JOHNSON et al.

Civ. 9024.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

Rehearing Denied July 10, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Insurance ☞ 151(2)

Where life policy stated that policy and application constituted entire contract, whole application was necessary to constitute the contract.

2. Insurance ☞ 130(1)

Whether name signed to proposal portion of application for life policy was signature of insured and whether insured's husband acted as her agent in procuring policy pursuant to his plan to kill insured to collect insurance moneys held immaterial, as respects validity of policies issued, where insur-

ed knew she was applying for insurance and did so in good faith.

3. Insurance ⚡130(1)

Signature of insured to application is not necessary to predicate issuance of valid policy, even though policy inferentially requires signature of insured to application.

4. Husband and wife ⚡25(1)

Husband *held* competent to act as agent of wife who intended and was in good faith applying for insurance, as respects validity of life policy issued on application, the proposal portion of which was signed by husband.

5. Husband and wife ⚡25(5)

Insured, who knew that she was applying for life policy at time of her medical examination and who signed medical portion of application for life policy before husband delivered application, to which he had signed insured's name, to soliciting agent, ratified act of husband in signing her name and approved his agency from beginning, as respects validity of policies issued (Civ. Code §§ 2307, 2311).

6. Insurance ⚡247

Rescission of life policies could not be concluded by cashing of check by beneficiary for premiums which insurer sent to beneficiary with letter of cancellation, where insurer knew at time that premiums were returned to beneficiary with letter of cancellation that beneficiary had been convicted of murder of insured, since beneficiary as matter of law then had no interest in policies.

7. Insurance ⚡247

Letter of cancellation of life policies which stated that soliciting agent to whom note had been given in payment of part of premiums had canceled note as void and of no effect because agent had made out note and signed insured's name thereto *held* ineffectual to cancel policies, where letter was not signed by agent, and agent had not returned or offered to return note.

8. Insurance ⚡400

When policy contains incontestable clause, insurer must take legal action to cancel such policy within prescribed period in order to effect rescission or cancellation, in absence of clear and unambiguous rescission.

9. Insurance ⚡136(2)

Where soliciting agent handed policy to insured's husband, who was her agent for purpose of making application for policy, and sent policy to insurer with application signed by agent for change in policy providing for semiannual instead of annual payment of premiums, along with cash and note pay-

able to agent, who had signed insured's name thereto, for amount of premium, policy was both paid for and delivered, as respects validity of policy, notwithstanding that reissued policies were never delivered to insured or any one in her behalf (Civ. Code § 2598).

10. Insurance ⚡130(6)

Second insurance policy which was issued on strength of application for first policy by insured's husband, who was her agent for purpose of making application, *held* regularly issued, as respects validity of second policy.

11. Fraud ⚡50, 58(1)

Fraud will not be presumed and proof thereof must be clear, convincing, and unequivocal.

12. Insurance ⚡262

That insured's name on proposal portion of application for life policy was not in handwriting of insured *held* not such fraud as would invalidate policy, where insured's husband who signed her name was insured's agent for purpose of making application.

13. Insurance ⚡262

That insured's husband made application for life policy for wife for sole purpose of killing wife to collect insurance money was not such fraud as could be charged to wife, as respects validity of policy, and if it could be charged to wife it would not interfere with validity of issuance of policy, but would merely avoid policy validly issued.

14. Insurance ⚡400

Insurer who failed to contest policy containing 2-year incontestable clause because of alleged fraud within two years could not thereafter assert such fraud.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by Mary Meyer, administratrix of the estate of Hazel Edna Johnson, deceased, and another against Granville William Johnson and another. From the judgment, the plaintiffs appeal.

Reversed, with directions.

James P. Clark and Laird L. Neal, both of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondents.

ROTH, Justice pro tem.

This is an action in which appellants, as plaintiffs, seek to recover the proceeds of two several life insurance policies issued

April 21, 1926, and delivered April 28, 1926, on the life of Hazel Edna Johnson, deceased, the insured. Plaintiffs are the mother of the deceased, as administratrix of her estate, and the minor son of deceased by a former marriage. Defendant Granville William Johnson, hereinafter referred to as defendant, was the husband of deceased and the beneficiary named in the policies. Within a few days after the policies were issued, deceased, her minor son, and defendant started on an automobile trip to Missouri, and while in the state of Arizona, the husband, on May 2, 1926, killed the deceased, and was subsequently tried and convicted of murder. He is now serving a term of life imprisonment. On April 27, 1928, plaintiffs brought the instant action. At the time of the first trial, respondent insurance company (hereinafter referred to as respondent), one of the defendants herein, objected to the introduction of any evidence, on the theory that plaintiffs could state no cause of action. The objection was sustained, and judgment subsequently entered against the plaintiffs. This judgment was reversed (Meyer et al. v. Johnson et al., 115 Cal. App. 646, 2 P. (2d) 456), and the cause sent back for trial; the appellate court holding that since the beneficiary named in the policy murdered the insured, he was disqualified to take, but that the heirs at law of the insured had a right to maintain an action on the policies in question. The status of plaintiffs as heirs at law is conceded. Respondent's defense, successfully urged at the second trial, from which this appeal arises, briefly stated, is that the policies were in fact never issued or delivered, inasmuch as defendant made application for the same, without any authorization from his wife, for the sole purpose of perpetrating the crime he subsequently committed, in order to collect the insurance.

An analysis of the evidence discloses that one Starr, soliciting agent for the respondent, commenced to talk insurance with defendant the latter part of February, 1926, first with reference to the life of defendant, and later, during the course of the negotiations, according to the testimony of Starr, because of defendant's stomach trouble, it was decided that the life insurance be taken out on the life of deceased. After approximately six weeks of contact between defendant and Starr, two blank applications were handed to defendant, who subsequently returned them to Starr; one completed in pencil in the handwriting of

deceased (according to the testimony of defendant), and the other in blank, except for the signature of deceased in ink. The penciled application was either lost or destroyed by Starr; it being definitely established at the trial that it was not available. The application of the deceased signed in ink was completed by Starr from the information contained in the penciled application, and the signature of deceased witnessed by Starr, although he subsequently testified he did not actually see deceased sign, and further that he never saw deceased at all, since he conducted all of his negotiations with defendant. At the trial the father, mother, and cousin of deceased, all of whom were properly qualified, testified that the ink signature signed in blank to the application which was filled in by Starr and ultimately filed with respondent was the signature of deceased. The defendant, in a deposition introduced at the trial, testified to the same effect. The only contrary evidence was the testimony of a handwriting expert, who said that the writing was that of defendant and not that of deceased. Upon such conflicting evidence, the trial court found: " * * * Said name of Hazel Edna Johnson was forged by Granville William Johnson * * * without knowledge to defendant New York Life Insurance Company; * * * that the policies of insurance * * * were prepared and signed * * * in the belief that said application for said policies was signed by the insured * * * that said defendant New York Life Insurance Company relied on the statements contained in said application. * * *"

Since there is credible evidence to sustain the trial court's finding, it would not ordinarily be disturbed. It and other findings of a like tenor are sufficient, in the absence of other circumstances, to sustain the judgment that no policies were validly issued.

Upon the foregoing résumé, the findings of the trial court would be unquestionably decisive. Certain uncontradicted and uncontroverted facts, however, compel and impel us to view the matter from a different perspective and to reach a different conclusion.

[1] The application for the policies in this case, as is true with most such applications, is in two parts, one of which is the proposal to take life insurance or the part which contains the disputed signature, and the other the medical examination of the

deceased, which likewise called for the signature of the deceased. The medical portion of the application is signed by the insured; there being no controversy on this point. The policies recite, on their faces: "The policy and application therefor, a copy of which is attached hereto, constitute the entire contract." As a matter of fact, as well as of law, it is apparent, therefore, that the whole application was necessary to constitute the contract. *Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 151 P. 159; *Paulhamus v. Security Life & Ann. Co. (C. C.)* 163 F. 554; *Goodwin v. Provident Sav. Life Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Morris v. State Mutual Life Assur. Co.*, 183 Pa. 563, 39 A. 52; *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612; *Holden v. Metropolitan Life Ins. Co.*, 11 App. Div. 426, 42 N. Y. S. 310; *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 384, 55 A. 291, 62 L. R. A. 774; *Ames v. Manhattan Life Ins. Co.*, 31 App. Div. 180, 52 N. Y. S. 759, affirmed 167 N. Y. 584, 60 N. E. 1106; *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 112 N. E. 350.

The trial court found as a fact that the deceased was "examined by Doctor Richard C. McCloskey, a medical examiner of defendant New York Life Insurance Company, and on or about said date signed in her own handwriting the answers to medical examiner on the form provided by defendant New York Life Insurance Company and as set forth in plaintiffs' Exhibit 4. * * *" Starr persistently denied that he had had any contact with the deceased, although defendant asserted in his deposition that Starr had had at least two personal interviews with deceased with reference to the policies. Starr, however, admitted that at the time the application was made respondent had in its employ an inspector, as distinguished from a medical examiner, when he turned in his request for medical examination; with reference to which phase of the matter Starr testified in part as follows:

"Q. Who, if anyone, other than Mr. Johnson, negotiated with you or had anything to do with the issuance of these policies? A. So far as I was concerned, only Mr. Johnson. Mrs. Johnson was examined by the doctor and also seen by our inspector. That was a conclusion that I would naturally draw.

"Q. It was a conclusion and not a statement of fact? A. The doctor I knew had

made the medical examination, apparently because it had come in." Whether the inspector mentioned actually called upon and interviewed deceased does not appear.

The record shows without dispute that Dr. McCloskey, the medical examiner, examined the insured at her home, 4409 Turquoise street, in Los Angeles; that he identified his signature on the reverse side of the medical portion of the application and that the woman he examined signed her name, Hazel Edna Johnson, in his presence, and that when he arrived to make the examination, the person he examined was the only person in the house; and, further, that his usual routine on making such a visit was to announce that he was the examiner for the New York Life Insurance Company. He further testified without contradiction that all the handwriting on the medical portion of the application was his handwriting, except for the signature of the deceased, and except for two notations; that he went to make the examination under instruction of the medical department of respondent, which department told him whom he was to see; that respondent told him he was to see Hazel Edna Johnson, and that he inquired for her by that name when he got there, and the woman he examined was the woman who said she was Hazel Edna Johnson and was the woman who signed the responses to his inquiries. In section 6, subdivisions a, b, c, and d, of the medical portion of the application, the deceased answered "No" to the following questions: "Have you now pending any other application for insurance on your life or for the reinstatement of insurance? Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance? Have you ever been declined for life insurance or for the reinstatement of life insurance? Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?"

In the medical examiner's report with reference to the medical portion of the application, the following appears: "29. A. What is the name of the agent as given by the applicant? A. Starr. B. If known, state Branch Office agent is connected with. B. L. A."

The foregoing résumé of the evidence with reference to the medical portion of the application being *undisputed*, it can hardly be urged that the deceased did not know that she had an application for life

insurance pending, and that she did not know who the soliciting agent was.

[2] If the deceased knew that she was applying for insurance and intended to do so in good faith, it would make no difference, so far as the validity of the application is concerned, whether the name signed to part 1 or the proposal portion of the application was her signature or not. Nor would it make any difference how foul or sinister the purpose of defendant was in persuading her to apply for insurance, assuming that he did persuade her, or that the defendant actually did have in mind at the time the application was made the brutal and infamous crime that he subsequently perpetrated. In fact, it would make no difference whether the insured signed the application at all, even though, as already pointed out, she did actually sign the medical portion of the application.

[3] There is not a scintilla of evidence in the record impugning the good faith of deceased. Indeed, it would call for a deranged imagination to suppose that the deceased was a party to a plan for her own murder so that her husband might reap a financial profit. It is well established that the signature of an insured to an application is not necessary to predicate the issuance of a valid insurance policy, and this is so even though the policy inferentially requires the signature of the insured to the application, which the policies in question do not. *Bloom v. Pacific Mutual Life Ins. Co.*, 85 Cal. App. 419, 259 P. 496; *Kahn v. Royal Indemnity Co.*, 39 Cal. App. 180, 178 P. 331. In the latter case, the court says, 39 Cal. App. 180, at page 183, 178 P. 331, 332: "It is admitted by the respondent that the circumstances under which the application was received are somewhat vague and uncertain, but it is true, as claimed, that it was never signed by the deceased. The policy further provides, however, that: 'This policy with a copy of the application therefor *signed by the insured*, and such other papers as may be attached to or endorsed hereon, shall constitute the entire contract between the company and the insured. * * *' As urged by the appellant, the policy gives no support, therefore, to the contention of counsel for respondent, for whether the application was signed by the insured or not, it is a paper attached to the policy, and therefore constitutes a part of the contract between the company and the insured, under the provisions of which the insured agreed to accept the policy subject to all the terms

and conditions contained in the application. *And the fact that it was not signed is immaterial.*" (Italics ours.)

[4,5] Furthermore, assuming the same premise, to wit, that the deceased intended to and was in good faith applying for insurance, defendant, her husband, was entirely competent to act as her agent. The evidence shows that he did in fact so act, and was accepted as her agent by respondent. On this phase of the matter, the record shows without dispute that the two blank applications were handed to the defendant by Starr; that defendant subsequently returned them to Starr, one filled out in the penciled handwriting of his wife, and the other in blank containing her name signed in ink, which were accepted by the respondent's agent, who completed the application ultimately filed, using the penciled application to obtain the necessary information. Construing these facts in the light most favorable to respondent, the most that can be said is that defendant concocted a nefarious crime, and, as the first step towards its consummation, assumed to act as agent for the deceased to obtain insurance for her. The only evidence with reference to the handwriting of the penciled application is that it was the handwriting of the deceased. If this be true, there can be no question but that when defendant returned both applications to respondent's agent, he must have been requested to do so by deceased. Unfortunately, however, the penciled application has been lost or destroyed, and it may be that such penciled application was not in the handwriting of the deceased (since the only evidence on that subject is that of defendant), and that the whole thereof was forged by defendant and returned to respondent's agent. Assuming all the foregoing, it is still impossible to conclude that any adult of normal mentality (and there is not a remote suggestion to the contrary here) could undergo a medical examination and answer the questions required, some of which have been alluded to, and not know what was going on. Since we must conclude that deceased did know that she was applying for a policy of insurance at the time of her medical examination, it follows that at least as of the date of said medical examination, at which time she signed the medical portion of the application, she ratified and adopted the acts of defendant as to part one of the application, thus approving the self-assumed agency of the defendant. Civ. Code, §§ 2307, 2311; *Tosi v. Northern California*

Building & Loan Association (Cal. Sup.) 44 P.(2d) 333.

The court found that the medical examination by Dr. McCloskey was made on the 16th day of April, 1926. This finding is not supported by the evidence, since the medical portion of the application is not dated April 16, but April 9, 1926. The doctor's certificate which accompanied the medical portion of the application is also dated April 9th. An O. K. on the doctor's certificate, made by one Heaton, is dated April 13, 1926, and is stamped with the company's stamp as of April 12, 1926. Part 1, or the proposal portion of the application, is dated April 12, 1926; this date being in the handwriting of the soliciting agent, Starr, and admittedly having been inserted by him. From these facts it may be concluded that the penciled application and the blank application containing the signature were delivered to Starr after the actual date of the medical examination, or that they were delivered to Starr some time prior to April 9th and dated April 12th, to wit, the day upon which the medical portion of the application with the doctor's certificate was actually received at the office, as manifested by respondent's stamp. Respondent, however, admits in its brief that the medical examination of deceased took place prior to the delivery of the application by defendant to Starr, the soliciting agent. If this be true, then it must be clear that defendant was authorized to act for deceased from the beginning, and if he was, he clearly had a right to sign her name to the application. *Bloom v. Pacific Mutual Life Ins. Co.*, 85 Cal. App. 419, 259 P. 496.

The policies also contained a clause with reference to incontestability, as follows: "This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity." The complaint in this action was filed April 27, 1928, and the answer of the insurance company was filed June 21, 1928. Since the policies in question were dated and issued as of April 21, 1926, more than two years had elapsed before the insurance company set up any contest of these policies. It is settled that a contest of the insurer is too late if commenced after the expiration of the contestable period. *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199, 149 P. 171, Ann. Cas. 1917E, 34; *Tracy Loan & Trust Co. v. Mutual Life Ins. Co. of N. Y.*, 79 Utah, 33,

7 P.(2d) 279; *Murray v. State Mutual Life Ins. Co.*, 22 R. I. 524, 48 A. 800, 53 L. R. A. 742; *Patterson v. Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *Kline v. National Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. St. Rep. 703; *Mareck v. Mutual Reserve Fund Life Ass'n*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; *Metropolitan Life Ins. Co. v. Peeler*, 71 Okl. 238, 176 P. 939, 6 A. L. R. 441.

[6] It is true that in the instant case the answer sets up an attempted rescission as of July 26, 1926, on which date respondent sent a letter to defendant, the nominal beneficiary in the policy, and inclosed a check in his favor for the amount of the premium, which had been paid in cash, which check was received and cashed by defendant. Prior to July 26, 1926, defendant Johnson had already been convicted of the murder of his wife, and his motion for a new trial denied. He was at that time incarcerated in the county jail at Flagstaff, Ariz. In fact, the letter of respondent is addressed to defendant at that place. It has already been determined by this court, in *Meyer v. Johnson*, 115 Cal. App. 646, 2 P.(2d) 456, that defendant, the beneficiary named in the policies, is not entitled to take anything thereunder. Under such circumstances, no rescission or cancellation of the policies involved could be concluded by the acts of defendant, since defendant, in spite of the fact that he was named beneficiary in the policies, did not have at the time of the alleged rescission, as a matter of law, any interest therein. *Meyer v. Johnson*, supra. It is not disputed, in fact, the record affirmatively shows, that respondent had actual notice of all the facts, which precluded defendant from having an interest in the policies. As will appear with more particularity hereafter, the premium was paid partially in cash and the balance by note. The letter of cancellation addressed to defendant said in part: "The company has been further advised that such proposed insurance was being obtained solely at your insistence and all negotiations therefor were conducted by you, and that you have recently been convicted of the murder of said Hazel Edna Johnson." This admission in the letter, together with the fact that, as early as May 4th, respondent had withheld transmittal of the reissued policies, leaves nothing to the imagination

so far as respondent's knowledge of the facts is concerned.

[7,8] The same letter of cancellation said, with reference to the note: "Mr. Starr the soliciting agent holds a promissory note for \$66.12 bearing date April 28, 1926, purporting to be signed by Hazel Edna Johnson, and to be given in connection with said policies, but the company has been advised by Mr. Starr that he himself filled out said note and signed the name of said Hazel Edna Johnson thereto and said note is being cancelled as void and of no effect." The letter is signed by an officer of respondent. It is not signed by Starr, nor has Starr offered to return or actually returned the note. Respondent, so far as the record shows, had no authority to cancel Starr's note. The alleged cancellation or rescission is itself ineffectual, assuming that a notice of rescission or cancellation with a return of cash premium could be made with defendant. The facts with reference to an actual consummation of a cancellation or rescission are important, since it has been questioned even as between proper parties whether a notice of cancellation or rescission would actually effect a cancellation or rescission of a policy unless the facts and circumstances show a clear and unambiguous rescission. In the absence of a clear and unambiguous rescission, it has been held that *when a policy contains an incontestable clause* the insurer must take *legal action* to cancel such a policy within the prescribed period in order to effect a rescission or cancellation. *Tracy Loan & Trust Co. v. Mutual Life Ins. Co. of N. Y.*, 79 Utah, 33, 7 P.(2d) 279; *American Trust Co. v. Life Insurance Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Thistle v. Equitable Life Assur. Soc.*, 149 Tenn. 667, 261 S. W. 667; *Reliance Life Ins. Co. v. Thayer*, 84 Okl. 238, 203 P. 190; *Mutual Life Ins. Co. of N. Y. v. Buford*, 61 Okl. 158, 160 P. 928; *Killian v. Metropolitan Life Ins. Co.*, 251 N. Y. 44, 166 N. E. 798, 64 A. L. R. 956. In the *Tracy Loan & Trust Co. Case*, supra, the court says, 7 P.(2d) 279, pages 280, 281:

"The decisions are not unanimous as to how a contest under an incontestable cause may be begun. Some courts hold that a mere letter or notice of rescission with offer to refund premiums paid is a sufficient act of contest. *Mutual Life Insurance Co. v. Hurni Packing Co.* (C. C. A.) 280 F. 18; *Great Southern Life Insurance Co. v. Russ* (C. C. A.) 14 F.(2d) 27. But the

great weight of authority is that a mere letter of rescission is not a contest even if accompanied by an offer to return premiums paid, but that the insurer must make its contest in the courts, and that such a contest is nothing short of a proceeding where the parties are actually at grips with issues joined involving the invalidity of the policy. The cases hold 'a contest begins when the contestants, satisfied no longer with minatory gestures, are at grips with each other in the arena of the fight. When the fight is a civil controversy, the arena is the court.' *Killian v. Metropolitan Life Insurance Co.*, supra. 'A contest so provided for imports litigation, the invoking of judicial action to cancel or prevent the enforcement of the policy, either by a suit to that end or by a defense to an action on the policy.' *Northwestern Mutual Life Insurance Co. v. Pickering* (C. C. A.) 293 F. 496, 499, certiorari denied 263 U. S. 720, 44 S. Ct. 229, 68 L. Ed. 524. 'In order to contest the policy it (the insurer) was required to file an answer to the suit brought by the beneficiary within one year, or to have instituted an action of its own in equity to cancel the policy on the ground of fraud.' *Missouri State Life Ins. Co. v. Cranford*, 161 Ark. 602, 257 S. W. 66, 69, 31 A. L. R. 93. Other cases supporting this rule are cited in 37 C. J. 540 and in the recent decisions of *Killian v. Metropolitan Life Insurance Co.*, supra; *New York Life Insurance Co. v. Hurt* (C. C. A.) 35 F.(2d) 92; *Rose v. Mutual Life Ins. Co.* (C. C. A.) 19 F.(2d) 280; and *Powell v. Mutual Life Insurance Co. of N. Y.*, 313 Ill. 161, 144 N. E. 825, 36 A. L. R. 1239, and note. It follows that the filing of an answer or counterclaim such as was filed in the federal court would be sufficient if the filing in that court is to be given the same effect as would follow had it been filed in the state court without removal, or had there been no remand to the state court from the federal court."

Respondent admits that the law as stated with reference to incontestability is sound, but contends that here there was no reason to contest because no policies were ever validly issued. If this contention of respondent is sound, is it not equally tenable to say that it was a useless act for respondent to even attempt, as it did, to effect a cancellation by letter? If the policies, as respondent contends, did not legally exist, there was no more need for an attempted cancellation or rescission by letter than there would be by legal action.

[9] Other questions have been raised with reference to the actual issuance or delivery of the policies in question and the payment of premium therefor. With reference to these questions, it appears that the application originally was for one life insurance policy of \$2,500, which called for payment of premium annually. The soliciting agent, Starr, requested the company to issue and forward two several life insurance policies in that amount, which were issued on April 21, 1926. When the policies arrived on April 28, Starr took the original policy, as ordered, together with the additional \$2,500 policy which had been issued, and showed the two policies to the defendant. He testified that he saw defendant at the home of defendant and deceased, but that Mrs. Johnson was not in the house. It appears that defendant told Starr they would take both, if Starr would arrange to have the premiums paid semi-annually instead of annually. Starr testified that he handed the policies to defendant, that he and defendant both looked them over, but that he did not leave the policies with defendant, but took them away with him for the purpose of obtaining the indorsement to effect the change in method of payment of premium as desired. He further testified that defendant made a cash payment, which was approximately one-half of the premium on both policies; that he returned to the office with the policies, made out a note for the full amount of the balance of the premium to himself, and signed the note, Hazel Edna Johnson, transmitting both the note and the cash to the home office of respondent, together with an application for a change in the policies providing for payment of premium semiannually instead of annually. The application for the change was also signed by Starr, who admits saying nothing about the necessity of having such application signed by the insured, either to defendant or to the insured. The policies with the requested change were reissued at the home office of respondent on May 4, 1926, but before the reissued policies were actually forwarded for delivery, the respondent received information that the defendant had killed the insured on May 2, 1926. Accordingly, the reissued policies were never delivered to the insured or to the beneficiary, or to any one on behalf of the insured. On similar facts the cases hold that there has been both payment and delivery. Civ. Code, § 2598; Bloom v. Pacific

Mutual Life Ins. Co., supra; Vierra v. New York Life Ins. Co., 119 Cal. App. 352, 360, 361, 6 P.(2d) 349; Masson v. New England Mutual Life Ins. Co., 85 Cal. App. 633, 639, 260 P. 367; Kansas City Life Ins. Co. v. Hislip, 154 Okl. 42, 6 P.(2d) 678; Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233; Palmer v. Continental Ins. Co., 132 Cal. 68, 64 P. 97.

[10] There is little in the record in addition to what has been recounted with reference to the facts surrounding the second policy. It is clear, however, that the second policy as well as the first was issued on the strength of the application for the first, which is the only application. There is no evidence in the record other than that already detailed which sheds any light upon the scope of defendant's agency, respondent contending, as we have already recorded, that defendant was not the agent of the insured at all. Since we have held that he was her agent for the purpose of making the application for the original policy and since the second policy was issued on the strength of the application for the first, the second policy, in our view of the matter, *was regularly issued*.

[11-14] The cases are legion to the effect that fraud will not be presumed and that proof thereof must be clear, convincing, and unequivocal. In this case the two facts suggesting fraud were, first, that the name signed to part 1 of the application was not in the handwriting of deceased, and the fact that defendant killed his wife within a few days after the receipt of the policies. The first fact shows no fraud, and the second, assuming that defendant had in mind the murder which he subsequently committed, at the time the second policy was accepted, which is proved only by the fact that the murder was actually committed, cannot be charged to the insured. Such fraud, assuming that it could be proved, would not interfere with the validity of the issuance of the policy, but would, if successfully proved, have the effect of avoiding a policy validly issued. Respondent, by the terms of its own contract, limited itself to two years to establish the alleged fraud and having failed to do so within that time, it is now precluded from asserting it. Mr. Justice Story, in the case of Carpenter v. Providence Washington Insurance Co., 16 Pet. 495, 509, 10 L. Ed. 1044, at pages 1050, 1051, said:

"It is not true, that because a policy is procured by misrepresentation of material facts, it is therefore to be treated, in the sense of the law, as utterly void ab initio. It is merely voidable, and may be avoided by the underwriters, upon due proof of the facts; but until so avoided, it must be treated, for all practical purposes, as a subsisting policy. In this very case, the policy has never, to this very day, been avoided or surrendered to the company. It is still held by the assured; and he may, if he pleases, bring an action thereon to-morrow; and unless the underwriters should, at the trial, prove the misrepresentation, he will be entitled to recover. * * * Indeed, we are not prepared to say, that the court might not have gone further, and have held, that a policy, existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts, should have been notified to the underwriters; even although, by proofs, afforded by such extrinsic facts, it might be held, in its very origin and concoction, a nullity."

The judgment is reversed, and, since the conclusions we have reached are based upon undisputed evidence, the trial court is directed to modify and alter its findings in accordance with the views herein expressed, and to enter judgment for appellants for the full amount of said policies plus interest thereon.

We concur: HOUSER, Acting P. J.; YORK, J.



7 Cal.App.2d 597

BAIRD v. SMITH.

Civ. 9242.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1935.

Rehearing Denied July 11, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Pleading ⚡430(2)

Variance between answer, alleging satisfaction of note sued on by agreement with payee bank, and proof of agreement between maker and bank's receiver, *held* waived by failure to object to admission of testimony

supporting defense of accord and satisfaction.

2. Appeal and error ⚡882(3)

Question of insufficiency of pleadings to warrant admission of evidence received thereunder cannot be raised on appeal, where case was tried on theory of their sufficiency.

3. Evidence ⚡83(1)

Defense of accord and satisfaction by defendant's satisfaction of his second mortgage on land conveyed to bank's receiver in consideration of latter's agreement to cancel and return note sued on by him *held* properly sustained as against contention that receiver had no authority to compound defendant's debt to bank under statutes authorizing receivers to compound bad or doubtful debts, though bank president testified that note was good when given, in absence of evidence of its value or maker's worth at time of compromise agreement or showing that consideration given receiver was of less value than note; presumption being that receiver had right to settle debt without exacting payment in money (Code Civ. Proc. § 1963, subd. 15).

4. Accord and satisfaction ⚡21

Letter in which mortgagee requested payment of mortgage note by bank receiver, to whom mortgaged land was conveyed, after giving receiver written satisfaction of mortgage in consideration of his agreement to cancel and return mortgagee's note to bank, *held* not to show that mortgagee repudiated and abandoned settlement agreement, so that receiver could not recover on latter note, in absence of evidence that he acquiesced in suggestions of such letter.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by L. R. Baird, as receiver of the State Bank of Milton, N. D., against Tom Smith. Judgment for defendant, and plaintiff appeals.

Affirmed.

F. C. Heffron, of Eugene, Or., and George H. Stone, of San Diego, for appellant.

Donald Armstrong, of Los Angeles, for respondent.

SHINN, Justice pro tem.

[1,2] In this action upon a promissory note, the findings of the court sustained the defense of accord and satisfaction. One of the points made by the plaintiff upon his appeal from the judgment is that de-

defendant's answer alleged satisfaction on the note, arrived at through agreement with the payee bank, whereas the proof showed an agreement between the maker and a receiver of the bank.

Defendant's testimony in support of this defense was received without objection. It included evidence of negotiations concluded with two separate receivers of the bank, and, while there were some variations as to the particulars of the agreement alleged and the agreement made, they did not relate to matters of substance nor were they such as to prejudice plaintiff in the presentation of his case. The situation is very clearly one in which the objection of variance between pleading and proof is waived by the failure to make it upon the trial. If, during the trial, plaintiff was not conscious of having suffered any disadvantage on account of the supposed inadequacy of defendant's answer and he chose to make no objection to the evidence offered thereunder, we cannot see how the point can justly be raised on appeal when it is too late to amplify the allegations of the answer by amendment. The rule is well established that, where a case is tried upon the theory that the pleadings are sufficient to admit the evidence which is received, the question of their insufficiency cannot afterwards be raised. *Busch v. Los Angeles Ry. Co.*, 178 Cal. 536, 174 P. 665, 2 A. L. R. 1607; *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752; *Russell v. Ramm*, 200 Cal. 348, 254 P. 532.

[3] Defendant's testimony was to the effect that a parcel of land in the state of North Dakota, upon which defendant held a second mortgage, was conveyed to the receiver of the payee bank; that defendant agreed to satisfy his mortgage on the land, and in consideration therefor defendant's note to the bank was to be considered paid and surrendered to him. Defendant testified that, pursuant to this agreement, he executed and delivered to the receiver a satisfaction of the mortgage which he held, and the receiver agreed to cancel and return his note. The trial court decided this issue of accord and satisfaction in defendant's favor. These findings are questioned by appellant upon the ground that it was not shown that the receiver had authority to compound defendant's debt to the bank. Under the statutes of North Dakota which governed the actions of the

receiver, he had authority to compound bad or doubtful debts. Appellant contends that defendant's obligation was not shown to have been either bad or doubtful, but that, upon the contrary, it was shown to have been good. There was testimony by the president of the plaintiff bank that the note was good at the time it was given, in 1915 or 1916. However, the agreement of compromise was made in January, 1921, and no evidence was given as to the value of the note or the worth of its maker at the time. We think the case is ruled by the presumption that official duty has been properly performed. It does not appear that the consideration given the receiver in the settlement was of less value than the note. It will not be presumed that the receiver, a public officer, exceeded his authority and that he compromised the claim of the bank against defendant wrongfully, or in violation of his legal duties. It will be presumed, therefore, that defendant's debt to the bank was one which the receiver could rightfully settle without exacting payment in money. Code Civ. Proc. § 1963, subd. 15; *Mead v. City of Los Angeles*, 185 Cal. 422, 426, 197 P. 65; 22 Cor. Jur. 130; *Woolridge v. LaCrosse Lumber Co.*, 291 Mo. 239, 236 S. W. 294, 19 A. L. R. 1068; *Oliver v. United States (C. C. A.)* 267 F. 544; *Smythe v. Central Vermont Ry. Co.*, 88 Vt. 59, 90 A. 901.

[4] It is further claimed by appellant that, after the date of defendant's agreement with the receiver, defendant repudiated and abandoned the agreement. This argument is based upon correspondence from the defendant to the receiver, in which defendant requested payment of the mortgage note, of which he had formerly given the receiver a written satisfaction. There was no evidence that the receiver acquiesced in the suggestions contained in the letter, and, if it be considered that defendant made the proposition to abandon the agreement of settlement, his offer would be ineffective unless accepted. There appears to be ample reason for the conclusion of the trial court that the agreement of settlement was neither rescinded nor abandoned. The evidence supports the finding of the court, and the appeal presents no cause for disturbance of the judgment in defendant's favor.

Judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

8 Cal.App.2d 13

SARKISIAN v. SARKISIAN.
Civ. 9110.District Court of Appeal, Second District,
Division 1, California.
June 24, 1935.**Pleading** ⇨238(2)

Order made without notice to defendant's counsel granting leave to file amended complaint notwithstanding prior order dismissing the action *held* void.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Jack Sarkisian against S. A. Sarkisian. From an order granting plaintiff leave to file fourth amended complaint and denying defendant's motion to dismiss the action, defendant appeals.

Reversed.

George Acet, of Los Angeles, for appellant.

Martin E. Geibel and Harry K. Cohen, both of Los Angeles, for respondent.

HOUSER, Justice.

It appears that in due course of the proceedings in the instant action, in the presence of counsel who represented the respective parties therein, on a specified date the trial court made an oral order by which the application of plaintiff to file a fourth amended complaint was denied, and the motion made by defendant to dismiss the action was granted. Later, on the same day, in the absence of, and without notice to counsel who represented defendant, the trial court made another and different order in the premises, the effect of which was to grant leave to plaintiff to file his fourth amended complaint, and the motion by defendant to dismiss the action was denied. On the day following the making of the latter of such orders, defendant appealed therefrom to this court. For sufficient reasons thereafter appearing, pursuant to a hearing on the return of a writ of prohibition, the Second Division of the Second District of the District Court of Appeal rendered its judgment by which the trial court was "restrained from proceeding further with the action" until the final determination of the instant appeal. *Sarkisian v. Superior*

Court, 129 Cal. App. 342, 18 P.(2d) 739. In effect it was there ruled that the second order made by the trial court was unauthorized and void. In reliance upon the correctness of the decision reached therein, it is ordered that the said order made by the trial court, and from which the appeal herein is taken, be and it is reversed.

We concur: CONREY, P. J.; YORK, J.



7 Cal.App.2d 634

THOMASON et al. v. HETHCOCK.
Civ. 9061.District Court of Appeal, Second District,
Division 1, California.
June 17, 1935.

Hearing Denied by Supreme Court
Aug. 15, 1935.

1. Physicians and surgeons ⇨14(4)

Ultimate question in malpractice action is whether treatment administered indicated, suggested, or demonstrated lack of care ordinarily possessed by physicians and surgeons practicing in the same or similar communities.

2. Evidence ⇨506

Physician testifying as expert in malpractice case cannot testify as to ultimate question of due care which jury is called on to determine.

3. Appeal and error ⇨204(1)

Failure to object to testimony at trial is consent thereto, and objection cannot be urged for first time on appeal.

4. Appeal and error ⇨977(3)**New trial** ⇨70

Power to grant new trial for insufficiency of evidence is largely within trial court's discretion, and its ruling will not be reversed, unless abuse of discretion clearly appears.

5. New trial ⇨70

Trial court on motion for new trial for insufficiency of evidence cannot ignore uncontradicted evidence accepted by jury, where such evidence is within knowledge of experts alone.

6. New trial ⇨70

Order granting new trial on ground of insufficiency of evidence, after verdict for plaintiffs in malpractice case, *held* unwar-

ranted in view of uncontradicted expert testimony that defendant failed to follow usual and ordinary method of treatment, though witness failed to give reason for his opinion.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by Lotta Fay Thomason and another against Edward E. Hethcock. From an order granting defendants' motion for new trial after verdict for plaintiffs, plaintiffs appeal.

Reversed.

Pace, Smith & Purdue, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

ROTH, Justice pro tem.

This is an appeal from an order granting motion for a new trial. The order appears to have been granted on the ground that the evidence is insufficient to sustain the verdict of the jury. In any event, the sufficiency of the evidence to sustain the verdict of the jury is the sole question urged on this appeal.

Respondent is a physician, sued for malpractice. A recapitulation of all the facts is not necessary to present and decide the controlling question. An hypothetical question was put to an expert called on behalf of appellant, which sufficiently and correctly summarized the evidence from appellants' view of the case to fairly present the situation to the expert. *Hutter v. Hommel*, 213 Cal. 677, 680, 3 P.(2d) 554; *Treadwell v. Nickel*, 194 Cal. 243, 267, 228 P. 25. The question ended with the following paragraph: "In your opinion, based upon this statement of facts, was the procedure of the defendant, in advising and in administering the treatment and in the care of the patient thereafter, such as, in the exercise of due caution and ordinary skill, would be commonly adopted and used by reputable physicians and surgeons generally in this locality under the same or similar circumstances?"

Objection and argument followed, and other questions by the court and counsel for both sides were then put, with more objections and more argument. Then followed a voir dire examination of the expert by respondent; and finally the trial court put a question and received an answer as follows: "Q. I did not ask you

to express an opinion. The question is, have you any opinion—can you answer that question—with the facts just given you and nothing else—can you answer either 'yes' or 'no.' Now, that is not a difficult question. Certain conditions have been stated there to you. Certain treatment administered. Now, then, the question is, have you an opinion as to whether or not this doctor that treated her followed the usual and ordinary method. And if you have an opinion, say so. A. That helps. I have such an opinion. And I am obliged to answer, no."

The negative opinion expressed by the expert in question is the only evidence in the record on the question of whether the respondent used such ordinary care as would be used by doctors possessing ordinary skill practicing in this locality under the same or similar circumstances.

Respondent criticizes at some length the question put by the court, as well as the original question put by appellants which has been referred to, and points out that neither question establishes or tends to establish that, because a usual or ordinary method of treatment was not followed, the diagnosis made and the treatment actually rendered was inconsistent with such as would be made and rendered by a physician under similar circumstances, using ordinary care and possessing the skill usually and ordinarily possessed by physicians and surgeons in the same locality.

[1] It may be conceded that the question which the jury must ultimately decide is not whether the treatment administered is such as would be commonly adopted and administered by doctors of ordinary skill in the use of ordinary care, but that the ultimate question is whether the treatment administered or the method used, whether a common method of treatment or not, was such, or was given in such a manner as indicated, suggested, or demonstrated a lack of that care, training, and skill which is ordinarily possessed by physicians and surgeons practicing in the same or similar communities. *McLennan v. Holder*, 1 Cal.App.(2d) 305, 314, 36 P.(2d) 448.

[2] In short, the ultimate question which the jury must answer, and the question or questions which a doctor testifying as an expert may answer for the purpose of furnishing to the jury evidence upon which a jury is to make up its mind, are not identical. *Samuels v. Willis*, 133 Ky. 459,

118 S. W. 339, 341, 19 Ann. Cas. 188; Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132. In the Willis Case, supra, 118 S. W. 339, at page 341, the court says: "Appellant testified, and a number of other witnesses in his behalf testified, as to the customary and correct method of skilled physicians in performing the operation which is the subject of this suit. Some of the witnesses were asked the hypothetical question whether, if the operation was performed in that manner, it was an ordinarily careful manner of doing it, or was negligent. Upon objection the witnesses were not allowed to answer that question. This was the correct ruling. That was for the jury alone. *Witnesses from a profession may be called to testify concerning the teachings of their science, and the customs of their craft, but whether these things amount to due care is for the court or jury to say in a controverted case.*" (Italics ours.)

The same distinction is pointed out in McLennan v. Holder, supra, where the court sustained an objection to a similar question, pointing out that the question propounded to the expert required the expert to decide what the jury must ultimately decide. In that case, 1 Cal.App.(2d) 305, page 312, 36 P.(2d) 448, 451, the court says, however:

"In National Automobile Ins. Co. v. Industrial Acc. Com., 132 Cal. App. 373, 22 P.(2d) 568, 569, we find the following:

"The rule has been declared that what is or what is not proper practice or the usual practice in treatment are questions for experts and can be established only by their testimony.' * * *"

There is no contention in this case that the jury was not properly instructed. On the contrary, a close scrutiny of the instructions shows that the jury was fully and accurately instructed as to the standard of care and skill required of a doctor and in all other respects on the question of liability.

[3] The question of the trial court, when read in connection with the hypothetical question directly put by appellant, and the discussion which ensued after the hypothetical question had been put, and the cross-examination which followed the expert's direct evidence, make it clear to us that the negative answer was directed to the hypothetical question as supplemented by the question finally put by the court. In addition, the question that was finally put by

the court was not objected to by respondent, even though there had been an avalanche of objections and discussion on practically every phase of the hypothetical testimony, and the right of the expert to testify at all, at prior stages of the proceedings. None of these specific objections, however, is discussed or urged on this appeal. The failure of respondent to object was in effect a consent that the testimony might be received and cannot be urged for the first time on appeal. McLennan v. Holder, 1 Cal.App.(2d) 305, 313, 36 P.(2d) 448.

The evidence of the expert mentioned being the only evidence, since the respondent called no experts from which the jury could properly determine whether respondent used the care and skill required by law, the single question is whether the trial court abused its discretion in granting the motion for a new trial.

[4] Cases are legion to the effect that the power to grant a new trial on the ground of insufficiency of the evidence is largely within the discretion of the trial court, and that an appellate court will reverse such an order only in the event there is a clear showing that this discretion has been abused. Roberts v. Southern Pacific Co., 54 Cal. App. 315, 318, 201 P. 958; Merralls v. Southern Pacific Co., 182 Cal. 19, 22, 186 P. 778.

In the Roberts Case, supra, it is said in 54 Cal. App. 315, at page 319, 201 P. 958, 959: "If there be any appreciable conflict in the evidence, the action of the trial court in granting a new trial is not open to review. Even in those cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force, or evidentiary value of the testimony, is one the determination of which is with the trial court in a proceeding on a motion for a new trial, where, as here, one of the grounds is the insufficiency of the evidence to justify the verdict."

[5, 6] In spite of the latitude allowed to a trial court, as suggested by the foregoing excerpt, such court cannot disregard and ignore uncontradicted evidence which has been accepted as a fact by a jury, when the evidence is of such a nature that it is within the knowledge of experts alone and not within the common knowledge of laymen. The case of William Simpson

C. Co. v. Ind. Acc. Comm., 74 Cal. App. 239, 242, 243, 240 P. 58, 59, is decisive of the issue in the instant case. In the Simpson Case the respondent, Industrial Accident Commission, ignored and rejected the uncontradicted testimony of medical experts on what was a proximate cause of a death. With reference to the action of the Industrial Accident Commission, this court said:

"Assuming that the law is correctly stated in this quotation from Corpus Juris, it will be noted that the court or jury may reject the testimony of experts, even though uncontradicted, except where 'the subject is one for experts or skilled witnesses alone, and the jury cannot properly be assumed to have, or be able to form, correct opinions of their own under which circumstances the unanimous evidence of properly qualified witnesses has been regarded by some courts as conclusive.'

"In this state it has frequently been held that the proper or usual practice and treatment by a physician or surgeon in the examination and treatment of a wound or injury is a question for experts, and can only be established by their testimony. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642; Houghton v. Dickson, 29 Cal. App. 321, 324, 155 P. 128; Dameron v. Ansbro, 39 Cal. App. 289, 300, 178 P. 874; Pearson v. Crabtree [70 Cal. App. 52], 232 P. 715:

"The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present

proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual." Hines v. Ind. Acc. Com., 215 Cal. 177, 187, 8 P.(2d) 1021; Ross v. Hieronymus (Cal. App.) 37 P.(2d) 837.

Respondent complains that the testimony of the expert is not of sufficient substance to sustain a verdict, because the expert gave no reasons for his opinion. While it may be true that an expert may give reasons for his opinion on direct as well as on cross-examination [Healy v. Visalia T. & R. Co., 101 Cal. 585, 36 P. 125; Jones on Evidence (2d Ed.) vol. 3, p. 2453, note 17], we know of no case, and have been cited to none, which requires him to do so. The facts in the hypothetical question put are in themselves reasons for an answer, and, finally, respondent has the undoubted right to probe for additional reasons on cross-examination, if such are desired. Since respondent failed to ask for the reasons which he claims are so important, we have a right to assume that the expert could have supplied abundant reasons had he been called upon to do so.

In the case of McLennan v. Holder, 1 Cal.App.(2d) 305, 314, 315, 36 P.(2d) 448, 452, the court on a somewhat analogous situation said: "This evidence in itself is sufficient to support the finding of negligence, as it is evidence that in this one respect defendant did not use the care and skill used by surgeons performing similar operations in the same or similar communities, according to the testimony to which we have just referred."

The order granting the motion for new trial is reversed.

We concur: CONREY, P. J.; YORK, J.

7 Cal.App.2d 376

LAUBSCHER v. BLAKE et al.**ROSE v. BLAKE.****BLAKE v. ROSE et al.****Civ. 9568.****District Court of Appeal, First District,
Division 2, California.****June 4, 1935.****Rehearing Denied July 3, 1935.****Hearing Denied by Supreme Court
Aug. 2, 1935.****1. Automobiles ⇨244(36, 37)**

Evidence, in action for injuries to passenger in automobile, driven by one defendant when struck by automobile driven by co-defendant, *held* sufficient to sustain jury's implied finding that latter defendant's negligent operation of latter automobile at excessive speed and delay in applying brakes after seeing former automobile was sole proximate cause of collision.

2. Automobiles ⇨171(2)

Statutes requiring carriers of passengers for hire to use utmost care and diligence and come to full stop before crossing interurban street railway tracks *held* not to define duties of driver of funeral automobile toward driver of another automobile; such drivers owing each other duty to exercise ordinary care under circumstances (Civ. Code, § 2100; St. 1931, p. 2127, § 135).

3. Appeal and error ⇨1064(1)

Instruction, defining duty of driver of funeral automobile toward passenger, suing such driver and driver of another automobile for injuries sustained in collision, in manner unduly favorable to former defendant, *held* not to justify reversal of judgment on verdict against latter defendant.

4. Appeal and error ⇨930(4)

Appellate court must assume, in support of jury's verdicts for automobile passenger and owner against driver of another automobile for injuries and property damage, sustained in collision at intersection of highway with cemetery road, on which such owner was driving, that jury found that such road was not private road, but public highway, so that he was not required to yield right of way to other automobile (St. 1923, p. 520, § 22; St. 1929, p. 542, § 132; St. 1931, p. 2102, § 21).

5. Automobiles ⇨244(11)

Evidence, in action for injuries to passenger in automobile, crossing highway on cemetery road when struck by another automobile, *held* sufficient to sustain jury's implied finding that such road was public high-

way within Vehicle Act, not private road (St. 1923, p. 520, § 22; St. 1931, p. 2102, § 21).

6. Automobiles ⇨171(2)

Words "public highway" in Vehicle Act include driveways on grounds of private, as well as public, "institutions," such as cemeteries, when open to use by general public; "institutions" not being limited to state institutions (St. 1931, p. 2102, § 21).

[Ed. Note.—For other definitions of "Highway" and "Institution," see Words & Phrases.]

7. Automobiles ⇨245(14)

Whether road entering lodge cemetery was private road or public highway *held* for jury in action for injuries to passenger in automobile, struck by another automobile at intersection of such road with highway (St. 1923, p. 520, § 22; St. 1929, p. 542, § 132; St. 1931, p. 2102, § 21).

8. Trial ⇨27

Denial of defendant's motion in action for injuries to passenger in automobile, struck by defendant's automobile, to require codefendant driver of former automobile to submit to eye examination, *held* not abuse of discretion, in absence of any indication in circumstances surrounding accident that codefendant's vision was defective or showing that such examination could not have been conducted by counsel in jury's presence.

9. Damages ⇨188(1)

Evidence, in action for injuries to passenger in automobile, driven by defendant filing cross-complaint against codefendant for damage to automobile in collision with automobile driven by codefendant, that cross-complainant paid \$361.90 to repair his automobile, *held* sufficient to sustain judgment for \$350 on verdict for cross-complainant against codefendant, though no witness testified that amount paid was reasonable value of repairs.

10. Appeal and error ⇨932(1)

In support of judgment on verdict fixing plaintiff's damages for injuries sustained, appellate court must accord full weight to testimony, accepted as true and seriously considered by jury, as to injury to plaintiff's nervous system.

11. Evidence ⇨14

It is matter of common knowledge that injury to nervous system often plays large part in causing suffering and disability.

12. Damages ⇨130(1)

Jury's award of \$7,500 damages to man 39 years old, employed as manager of business at \$75 per week, for fractures of maxillary bone and zygomatic process and bruises, necessitating physicians' and nurses' attend-

ance for some time, confinement to bed for 7 weeks and at his home for 3 months, and resulting in highly nervous condition for about a year and a half and inability to work for entire day, *held* not excessive, though special damages were less than \$1,000.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Louis Laubscher, Jr., against Thomas F. Kennedy, John W. Rose, and Suhr & Wieboldt, a corporation, in which defendant Rose filed a cross-complaint against defendant Kennedy and the latter filed a cross-complaint against defendants Rose and Suhr & Wieboldt. From judgments on verdicts for plaintiff and cross-complainant Rose against defendant Kennedy and a verdict denying cross-complainant Kennedy relief against defendants Rose and Suhr & Wieboldt, defendant Kennedy appealed, after which, on the deaths of defendants Kennedy and Rose, Richard D. Blake, executor, etc., of the estate of defendant Kennedy, and Louisa Rose were substituted as parties.

Judgments affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Myrick & Deering and Scott, of San Francisco, for respondent Suhr & Wieboldt.

J. Hampton Hoge, of San Francisco, for respondent John W. Rose.

George K. Ford and Albert A. Axelrod, both of San Francisco, for respondent Louis Laubscher, Jr.

SPENCE, Justice.

Plaintiff brought this action seeking to recover damages for personal injuries sustained when a Lincoln limousine in which he was riding collided with a Buick automobile driven by defendant Kennedy. The car in which plaintiff was riding was owned and driven by defendant Rose, who had been engaged by defendant Suhr & Wieboldt, a corporation, to drive it to Woodlawn Cemetery as a funeral car. Defendant Rose filed a cross-complaint against defendant Kennedy for damages to his automobile. Defendant Kennedy likewise filed a cross-complaint against defendant Rose and defendant Suhr & Wieboldt for damages to his automobile and

for damages for personal injuries. Upon a trial by jury, three verdicts were returned. The first was a verdict on the complaint which awarded plaintiff the sum of \$7,500 against defendant Kennedy but denied plaintiff relief against defendant Rose or defendant Suhr & Wieboldt. The second was a verdict on the cross-complaint of defendant Rose which awarded him the sum of \$350 against the defendant Kennedy. The third was a verdict on the cross-complaint of defendant Kennedy which denied him relief against defendant Rose or defendant Suhr & Wieboldt. Defendant Kennedy appealed from each of the three judgments entered upon said verdicts.

After these appeals were taken, defendant Kennedy died. Thereafter defendant Rose died. The representatives of said defendants have been substituted herein, but, in order to avoid confusion, we may disregard said substitutions in the discussion which follows.

The accident occurred on the afternoon of July 15, 1932, on the main highway in San Mateo county at the point where the road entering Woodlawn Cemetery intersects the main highway. Woodlawn Cemetery is owned and conducted by the Masonic Cemetery Association. The cars collided while defendant Kennedy was driving in a southerly direction on the main highway and defendant Rose was driving in an easterly direction out of the cemetery ground and across the main highway. We shall briefly describe the scene near the point of collision. The main highway is divided by a space in the center thereof devoted exclusively, except at crossings, to the double tracks of the interurban street railway. A concrete curb separates this space at all points other than crossings from the portion of the highway used by vehicles on either side of the tracks. On the west side of the highway there is a concrete strip approximately 30 feet wide which adjoins the curb on the westerly side of the tracks. Along the westerly side of the concrete strip there is a graveled shoulder approximately 16 feet in width. The southbound traffic uses the concrete strip on the westerly side of the tracks and the northbound traffic uses a similar concrete strip on the easterly side of the tracks. The cemetery fronts upon the highway and is entered by a road 40 feet in width. From the photographs in evidence it appears that this road crosses the street car tracks and continues on at the

easterly side of the main highway. Between the cemetery and the highway there is a very low white fence or guard rail, but it appears to be conceded that neither said fence nor any other object obstructed the view of the drivers.

[1] Plaintiff had acted as a pallbearer at a funeral of a friend, and the funeral party was leaving the cemetery to return to San Francisco. Their intended course was easterly down the cemetery road to the main highway, across the westerly side of the highway and the interurban tracks, and then northerly on the easterly side of the highway. The Lincoln limousine in which plaintiff and certain other pallbearers were riding was preceded by an automobile carrying the family of the deceased. It appears from the evidence that the Lincoln limousine was traveling at a speed of from 5 to 8 miles per hour as it came along the cemetery road and started to cross the highway. The Buick car was admittedly being driven by defendant Kennedy at a much higher speed in a southerly direction along the westerly side of the main highway. Defendant Kennedy estimated his speed at between 40 and 45 miles per hour, while several other witnesses testified to a much greater speed. When the Lincoln limousine arrived at a position in the middle of the concrete strip on the westerly side of the highway, the Buick car struck the left side thereof, causing plaintiff's injuries, as well as seriously damaging the two cars. We deem it unnecessary to set forth the evidence in greater detail, as defendant Kennedy admitted that he saw the Lincoln at a time when he was a long distance from the scene of the accident; that he knew it was a funeral car coming out, but that he did not apply his brakes until he was about 35 or 40 feet from the point of impact. He testified: "I applied the brakes 35 or 40 feet, may be 45 feet. I do not know exactly, I was traveling so fast."

It is contended on this appeal that each of the three judgments lacks evidentiary support, "for the reason that the evidence conclusively shows that negligence of the defendant Rose was the sole proximate cause of the accident." We find no merit in this contention. The foregoing summary of the evidence shows that there was ample evidence to sustain the implied finding that the sole proximate cause of the accident was the negligence of defendant Kennedy. However, certain statutory provisions are cited and are urged in support

of the foregoing contention as well as in support of the contention that the trial court erred in giving and refusing certain instructions.

[2,3] Appellant takes the position that defendant Rose was a carrier of passengers for reward or hire under the duty to use "the utmost care and diligence" (Civ. Code, § 2100), and that defendant Rose, as such carrier, was under a duty to come to a full stop before crossing the interurban tracks (California Vehicle Act, § 135 [St. 1923, p. 561, as amended by St. 1931, p. 2127]). It is sufficient answer to point out that these statutory provisions do not define the duties of defendant Rose toward defendant Kennedy. As between defendant Rose and defendant Kennedy, each was under the duty to exercise ordinary care under the circumstances, and the jury was so instructed. Assuming that defendant Rose owed a higher degree of care to plaintiff, this question is immaterial on this appeal which has been taken by defendant Kennedy and not by plaintiff. If the instructions defining the duty of defendant Rose toward plaintiff were unduly favorable to defendant Rose, a reversal of the judgment against defendant Kennedy would not be justified upon that ground. *Harju v. Market Street Ry. Co.*, 114 Cal. App. 138, 299 P. 788; *Goehring v. Rogers*, 67 Cal. App. 253, 227 P. 687; *Click v. Southern Pacific Co.*, 113 Cal. App. 528, 298 P. 839; *Bezera v. Associated Oil Co.*, 117 Cal. App. 139, 3 P.(2d) 622.

[4-7] Appellant also argues that the road leading into the cemetery was a private road rather than a "public highway," and that it was therefore the statutory duty of defendant Rose to yield the right of way to defendant Kennedy. California Vehicle Act, § 132 (St. 1923, p. 560, as amended by St. 1929, p. 542). The trial court, however, left this question of the nature of said road to the jury, and in support of the verdicts we must assume that the jury impliedly found that said road was a "public highway" as defined in the California Vehicle Act. Section 21 of the said act (St. 1923, p. 519 as amended by St. 1931, p. 2102) defines "public highway" as every "highway, road, * * * intended or used by or for the general public, * * *" including "driveways and paths upon the grounds of universities, colleges and institutions when and during such times as such driveways and paths are open to traffic. * * *" A "private

road" is defined in section 22 of said act (St. 1923, p. 520). There was ample evidence to show that said road was at all times open to the general public during the daytime and that the general public used said road to visit the burial grounds. We therefore believe that there was ample evidence to sustain the implied finding that said road was a "public highway" as defined in said act. Appellant's claim to the contrary is based largely upon the contention that the cemetery was not an "institution" as said term is used in the act. We find no merit in this contention. It is conceded that the word "institution" has various meanings (32 Cor. Jur. 942), many of which are sufficiently broad to cover a cemetery, but it is argued that said term as used in that act should be confined "to those entities and their establishments which are commonly accepted and recognized in our statutes as state institutions." We find nothing in the language of the act which shows any intention to limit the word "institutions" to state institutions. On the contrary, we believe it is entirely clear that it was intended that the words "public highway" should include driveways upon the grounds of private, as well as public, "universities, colleges and institutions" when such driveways are open to use by the general public. We therefore conclude that appellant's assumption, contrary to the implied finding of the jury, that said road was a "private road" rather than a "public highway" as defined in said act, is unwarranted, that the trial court properly left the question of the nature of said road to the determination of the jury under appropriate instructions, and that the trial court properly instructed the jury upon the statutory rights and duties of the drivers of the respective vehicles in the event that it determined that said road was a "public highway."

Appellant has challenged many of the instructions given by the trial court, and has complained of the refusal of the trial court to give certain other instructions. We have read the entire charge to the jury, and we are satisfied that all debatable questions raised by appellant in connection with the instructions are covered by the foregoing discussion.

[8] Appellant further contends that "the court erred to the prejudice of the appellant in denying his motion to have defendant Rose submit to an eye examination." We are of the opinion that this contention is likewise without merit. Defendant Rose

was not suing for damages for personal injuries, and appellant's purpose in asking for the eye examination was because of appellant's suspicion that said defendant's vision was not as good as he claimed it to be on cross-examination. Assuming, without deciding, that the trial court had the power to order such an examination, we find no abuse of discretion in the denial of appellant's motion. There was nothing in the circumstances surrounding the accident, as claimed by appellant, to indicate that said defendant's vision was defective, and, furthermore, it does not appear that an examination to ascertain the sufficiency of said defendant's vision for the purpose of operating an automobile could not have been conducted by counsel in the courtroom in the presence of the jury.

[9] Appellant also contends that the evidence was insufficient to sustain the judgment for \$350 in favor of defendant Rose because of the alleged inadequacy of the proof of damage. Appellant does not question the rule set forth in *Konda v. Frumppkin*, 90 Cal. App. 384, 265 P. 955, but claims that defendant Rose failed to make out a prima facie case thereunder. We find no merit in this contention. The amount paid to repair the Lincoln limousine was shown to be \$361.90. While no witness testified that this was the reasonable value of said repairs, the fact that said amount was paid for said repairs was some evidence of their reasonable value. *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 P. 30; *Townsend v. Keith*, 34 Cal. App. 564, 168 P. 402; 10 Cal. Jur. 543.

[10-12] The final contention made by appellant is that the award to plaintiff of \$7,500 is excessive as a matter of law. In support of this contention, appellant cites and relies upon *Hoover v. King*, 134 Cal. App. 16, 24 P.(2d) 871, but we find but little similarity between the injuries involved in the two cases. In the present case, plaintiff was a healthy man, 39 years of age, employed as the manager of a delicatessen business at a salary of \$75 per week. As a result of the collision, he was thrown against the instrument board of the Lincoln limousine, striking the left side of his face and causing unconsciousness and the fractures and resulting injuries hereinafter described. He was bleeding from the mouth, nose, and ears. While he was not taken to a hospital, he was attended by physicians and nurses at his home for some time following the accident. He

remained in bed for a period of 7 weeks and was at home for a period of 3 months. The doctor who attended plaintiff immediately after the accident testified that plaintiff suffered severe shock and was delirious for about a week thereafter; that the X-rays showed that there was a fracture of the left maxillary, before the maxillary sinus, and there was also a fracture of the zygomatic process; that plaintiff was also badly bruised about other portions of the body; that plaintiff was thereafter troubled with severe headaches and sleeplessness; that he was in a highly nervous condition, and at times would shake and tremble, which condition continued up to the time of trial approximately a year and a half after the accident; that plaintiff's vitality was run down; and that he contracted pneumonia, requiring hospitalization. It further appeared from the testimony that plaintiff's teeth were all loosened and bleeding as a result of the accident; that he could not eat except through a tube for some time thereafter because of the fractures above mentioned; that his nose continued to bleed and he continued to spit blood; that the left side of his face was still numb at the time of the trial, and that his left eye continued at all times to remain painful and bloodshot; that he had not suffered from colds or from nervousness before the accident, but had so suffered ever since the accident; that at times he could not write his name because of shaking from nervousness; that he was unable to work the entire day even at the time of the trial, but was compelled to leave his work and go home. Another doctor testified that the X-rays showed a depressed fracture which probably ran down into the left temporal region of the petrous bone; that the sinus was filled with fluid, probably blood; that the X-rays taken at the time of the trial showed that there was just a beginning of a healing of the fracture; the unconsciousness and continuance of the headaches

over a long period of time indicated a severe concussion of the brain; that plaintiff could not do any great amount of work at the time of the trial, and, if he attempted working long hours, he would probably have a nervous breakdown; that it was impossible to say how long the nervous condition would continue, but that it might continue indefinitely; that plaintiff should have treatments for the sinus condition; and that a radical sinus operation would probably be required.

We need not further refer to the testimony regarding plaintiff's injuries, for it is apparent from what had been said that the evidence showed that said injuries were severe, painful, disabling, and lasting. In fixing the award, the jury no doubt accepted as true and gave serious consideration to the testimony regarding the injury to plaintiff's nervous system. In support of the judgment, we must accord full weight to that testimony, and it is a matter of common knowledge that an injury to the nervous system often plays a large part in causing suffering and disability. *Taylor v. Lowenstein*, 113 Cal. App. 665, 298 P. 847; *Johnson v. Pearson*, 100 Cal. App. 503, 280 P. 394. While the special damages alleged and proved were less than \$1,000 and while the award for general damages was a substantial one, we cannot say that it was so grossly excessive as to shock the sense of justice or to suggest at first blush passion, prejudice, or corruption on the part of the jury. We therefore conclude that the judgment in favor of plaintiff should not be disturbed because of the amount awarded, in view of the settled rules governing the action of appellate courts in dealing with the question of damages.

The judgments appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

4 Cal.2d 17

MUEHLEISEN et al. v. FORWARD et al.
L. A. 15066.

Supreme Court of California.

June 28, 1935.

1. Municipal corporations ⇨124(5)

Where cities operate under freeholders' charters adopted under Constitution, recall of officers is a municipal affair, which may be governed by provisions of charter, and general law in such cases is superseded (Gen. Laws 1931, Act 5620a, § 17; St. 1931, p. 2858, § 23; Const. art. 11, § 8, amended in 1930).

2. Municipal corporations ⇨159(1)

Charter of city of San Diego held not to embody system for recall of elective city officials, but to incorporate by reference and make applicable to city recall system established by general law, subject to certain provisos (Gen. Laws 1931, Act 5620a, § 17; St. 1931, p. 2858, § 23).

3. Municipal corporations ⇨159(1)

Where provisions of city charter are so meager as to be inadequate as a system for recall of elective city officials and provisions are merely provisos modifying general law which is made controlling by reference, recall proceedings of city must conform to general law, as modified by charter provisos in order to be valid (Gen. Laws 1931, Act 5620a, § 17; St. 1931, p. 2858, § 23).

4. Municipal corporations ⇨159(1)

Failure to comply with requirement of city charter that recall petitions should be on forms prescribed by ordinance of city council could not be excused on ground that ordinance contravened charter, where charter provided that form should be specified by ordinance and form adopted followed general law which was made controlling by charter (Gen. Laws 1931, Act 5620a, § 17; St. 1931, p. 2858, § 23).

5. Municipal corporations ⇨159(4)

Where city charter did not embody system for recall of elective city officials, recall proceedings which did not comply with general law requiring publication or posting of intention, service on officers sought to be recalled and additional matters held invalid (Gen. Laws 1931, Act 5620a, § 17; St. 1931, p. 2858, § 23).

In Bank.

Application by Adolph Muehleisen and others for a writ of mandate addressed to John F. Forward, Jr., as mayor and member of the city council, and others, to compel respondents, as members of the city

council of San Diego, to call an election for the recall of certain officers of the city.

Alternative writ discharged and peremptory writ denied.

Prior opinion, 36 P.(2d) 141.

Charles C. Crouch, of San Diego, for petitioners.

C. L. Byers, City Atty., and H. B. Daniel, Deputy City Atty., both of San Diego, for respondents.

PER CURIAM.

This is a petition for a writ of mandate, to compel respondents as members of the city council of San Diego to call an election for the recall of certain officers of the city.

Five petitions were delivered to the city clerk on June 30, 1934, demanding recall of four members of the city council and of the city attorney. Notice of insufficiency of signatures was given by him, and supplemental petitions with additional signatures were filed, whereupon on July 23, 1934, the clerk certified that the requisite number of voters had been obtained, and presented the petitions to the city council. This body refused to call the election on the ground that the proceedings did not comply with the law. Thereupon petitioners sought this writ.

The statute governing recall of municipal officers (Deering's Gen. Laws, 1931, Act 5620a) provides that the proponents of a petition shall first publish a notice of intention to do so accompanied by a printed statement of the reasons for the proposed recall; that the notice and statement shall be published in a newspaper of general circulation, or where none is published within the county, posted in three public places; that a copy of the notice shall be served upon or sent to the officer sought to be recalled, and an affidavit of service filed with the clerk; that within fourteen days thereafter the said officer may publish an answer to the statement; that the petitions shall contain a copy of the notice of intention, and the statement and any answer made thereto, or if the officers have failed to make any answer, this shall be stated. The proponents of the recall proceeding under review made no attempt to comply with these statutory requirements, and it is clear that if the general law applies to recall elections in the city of San Diego, the proceeding was invalid. It therefore be-

comes necessary to determine whether that law applies to such elections.

[1] The city of San Diego has a freeholders' charter, adopted under the provisions of article 11, section 8, of the California Constitution. It is settled that in cities operating under such charters, recall of officers is a municipal affair, which may be governed by the provisions of the charter, and that the general law in such cases is superseded. *Bricker v. Banks*, 98 Cal. App. 87, 276 P. 399; *Scheafer v. Herman*, 172 Cal. 338, 155 P. 1084; *Sidler v. City Council of City of Bakersfield*, 43 Cal. App. 349, 185 P. 194. The statute governing recall (cited *supra*) itself declares in section 17 that it is not intended to apply to a city having a freeholders' charter and providing therein its own system of recall. Hence if the San Diego charter contains a complete recall procedure, and petitioners have followed it, they are entitled to the writ.

[2,3] But the charter does not embody such a system. It provides article 3, § 23, that the right to recall "shall be exercised in the manner provided by the Constitution and general laws of the State of California." It further states: "Ordinances may be initiated, or the Referendum exercised on ordinances passed by the Council, and any elective official may be recalled from office, under the provisions of the Constitution and the general laws of the State, provided * * * that for the recall of an elected officer it shall require a petition signed by twenty-five per cent of the entire vote cast in the City at the last preceding election for the office of governor. Petitions for the Initiative, Referendum, or Recall shall be on forms prescribed by an ordinance of the Council and shall state in full the ordinance to be initiated or referred or the officer to be recalled with reasons for such recall. This statement shall appear at the head of each petition. * * *" St. 1931, c. 47, p. 2858.

Two things appear very plainly in the above-quoted section: First, that the charter provides no system of its own; second, that it incorporates by reference, and makes applicable to the city the system established by the general law, subject to certain provisos. Not only is there no intent to exclude the general law; that law is expressly made applicable by direct reference, and impliedly made applicable by the failure to set up an alternative scheme. The meager provisions of the charter sec-

tion are wholly inadequate as a system for recall, and are by their nature, as well as by designation, mere provisos, which modify the general law theretofore referred to and made controlling. It requires no citation of authority to justify the conclusion that in such a situation the recall proceedings must conform to the general law, as modified by the charter provisos. The cases relied on by petitioners were concerned with charters which embodied a complete recall scheme of their own, and are consequently not in point. See *Scheafer v. Herman*, *supra*; *Sidler v. City Council of City of Bakersfield*, *supra*.

[4] It is to be noted, moreover, that the charter provides that the recall petitions shall be on forms prescribed by an ordinance of the city council, and shall state the reasons for such recall at the head of each petition. Ordinance No. 47 of the council prescribes a form for the petitions, similar in its requirements to the general law. It provides that the petition must contain a copy of the printed or posted notice of intention, and a copy of the officer's answer to the statement of reasons for the recall, or a statement that he has made no answer. There was no compliance with the requirements of this ordinance by the proponents of the recall, and it is suggested in justification of this omission that the city council cannot, by ordinance, contravene the provisions of the charter. This may be conceded, but it is manifest that the charter is not contravened by an ordinance specifying the form of petitions when the charter itself declares that the form shall be specified by such ordinance, and, moreover, where the form adopted follows that of the general law made controlling by the charter.

[5] It is impossible to hold that the proceedings under review were valid. The question is not of strict or liberal construction, nor is the case one of immaterial or unsubstantial departure from formal requirements. The charter provision is clear and requires no interpretation; and the requirements which were not followed are among the most important elements of the recall system established by the statute. It would seem that unless the general law governs recall elections in San Diego, no valid recall election could be held there, since no other procedure is provided.

The alternative writ is discharged and the peremptory writ denied.

4 Cal.2d 21

**KINCHELOE v. RETAIL CREDIT CO., Inc.,
et al. (two cases).**

FINK v. RETAIL CREDIT CO., Inc., et al.
S. F. 15379.

Supreme Court of California.

June 28, 1935.

Rehearing Denied July 25, 1935.

1. Release ⇨29(1)

Release of one of several joint tort-feasors operates as release of all.

2. Release ⇨37

Execution of covenant not to sue does not release other joint tort-feasors.

3. Release ⇨37

Instrument entitled "Covenant Not to Sue," wherein, for a stated consideration, plaintiff agreed not to litigate claims for injuries arising out of a designated automobile collision, and to indemnify the obligees against all liability arising therefrom, expressly reserving all claims against persons not specifically named in instrument, held not a "release" but a "covenant not to sue," execution of which did not release other joint tort-feasors from liability for plaintiffs' injuries.

[Ed. Note.—For other definitions of "Covenant Not to Sue" and "Release," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Actions by Newton Kincheloe, Newton M. Kincheloe, Jr., and Philo Fink, against the Retail Credit Company, Inc., a corporation, and another. From judgments on the pleadings for defendants in each case, plaintiffs appeal.

Reversed.

Prior opinion, 39 P. (2d) 483.

Lucius Powers, Jr., of Fresno, and Byrne, Lamson & Jordan, of San Francisco, for appellants.

Francis V. Keesling and Garton D. Keyston, both of San Francisco, Conley, Conley & Conley, of Fresno, and Harry G. McKannay, of San Francisco, for respondents.

Barbour, Kellas & Backlund, Edward L. Kellas, and Frank C. Lerrigo, all of Fresno, amici curiæ.

WASTE, Chief Justice.

Plaintiffs, riding in an automobile operated by N. Lindsey South, were injured in a collision with a car driven by defendant Adams for defendant Retail Credit Company, Inc. South's insurance company settled with plaintiffs and received a covenant not to sue, with an agreement to hold them harmless for any claims arising out of the accident. Plaintiffs then sued defendants, and they pleaded the instrument, claiming it was a release of other joint tort-feasors, releasing them also by operation of law. The lower court gave judgment on the pleadings for defendants on this theory.

Plaintiffs appealed. By order of the court, on stipulation of all the parties, the appeals were consolidated and heard on a single transcript. The instrument in question, in full, was pleaded in the answer, and is as follows:

"Covenant Not to Sue.

"Whereas, on or about April 13th, 1932, the undersigned, N. N. Kinchloe, of the County of Fresno, State of California, was riding in an automobile owned and driven by N. Lindsey South, and

"Whereas, the said automobile was involved in an accident with an automobile driven by Philip Adams, and owned by Philip Adams &/or Retail Credit Company &/or John Doe, which said accident happened and occurred at on Highway between Tulare and Tipton, State of California, and

"Whereas, the undersigned sustained certain injuries on or about his body and has suffered disability from said injuries, and,

"Whereas, the said N. Lindsey South and the Universal Automobile Insurance Company, desire from the undersigned an agreement and covenant not to sue them or either of them.

"Now, therefore, for and in consideration of the sum of \$130.00, one hundred thirty dollars, the undersigned, hereby promise and agree that he will not sue or litigate any claim, or claims, of any nature or description, against N. Lindsey South and the Universal Automobile Insurance Company, or either of them, for or on account of any injuries or damages which I now have, or may hereafter have, or have had on account of the injuries sustained in the accident above mentioned, and I do hereby covenant and agree to hold said N. Lindsey South and Universal Automobile Insurance Company

and each of them, and all of them harmless from any liability, claims, demands, costs, charges, and expense incident to any claim or claims, arising out of said accident, or the injuries sustained by me therein.

"It is further agreed, that the undersigned does not in any manner or respect waive or relinquish any claim, or claims, against any other persons, firms, or corporations, than are herein specifically named and it is further understood by me that said N. Lindsey South and the Universal Automobile Insurance Company do, and neither of them does, in any manner, or to any extent, admit any liability or responsibility for the above accident, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph as herein specified.

"In witness whereof, I have hereunto set my hand this 17th day of August, 1932.

"[Signed] N. N. Kinchloe.

"Witness to signature:

"Notary certificate attached.

"Lucius Powers, Jr."

[1-3] It is unquestionably the law that the release of one of several joint tort-feasors operates as a release of all. *Tompkins v. Clay Street R. Co.*, 66 Cal. 163, 4 P. 1165. But the legal effect of a covenant not to sue is not the same as a release. *Hawber v. Raley*, 92 Cal. App. 701, 704, 268 P. 943. The trial court was plainly in error. The document here is entitled a covenant not to sue. Its language is of covenant and indemnity, not of release. The trial court, however, ignored title and terminology, and held it to be a release, without permitting any evidence as to what it was. Since a covenant not to sue does not relieve other joint tort-feasors, the trial court was in error in granting the motion for judgment on the pleadings upon the ground that the document executed by plaintiff constituted a release and satisfaction of the claim for injuries received in the collision of the two automobiles.

The judgment is reversed in each case.

We concur: SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

3 Cal.2d 736

BRENNAN v. RILEY, State Controller.

FOLEY v. SAME.

Sac. 4959.

S. F. 15395.

Supreme Court of California.

June 20, 1935.

1. Mandamus ☞77(1)

In mandamus proceedings by rival claimants to same office to compel payment of salary attached to office, Supreme Court may determine rightful incumbent of office in order to determine to whom the salary is payable.

2. Army and navy ☞51

Chairmanship of Veterans' Welfare Board is separate from the office of member of the board, and the chairman holds his office at the pleasure of the Governor having the appointing power (Gen. Laws 1931, Act 7747, § 3; St. 1933, p. 2503, §§ 11-14; Pol. Code, § 878; Const. art. 20, § 16).

3. Army and navy ☞51

Chairman of Veterans' Welfare Board held entitled to salary only until appointment by Governor of his successor, after which salary attached to office belonged to such appointee (Gen. Laws 1931, Act 7747, § 3; St. 1933, p. 2503, §§ 11-14; Pol. Code, § 878; Const. art. 20, § 16).

In Bank.

Appeal from Superior Court, Sacramento County; J. O. Moncur, Judge.

Proceeding by John P. Brennan against Ray L. Riley, as State Controller of the State of California, for a writ of mandate to compel respondent to pay petitioner salary claimed to be due. From a judgment granting the writ, respondent appealed to the District Court of Appeal, and the cause was transferred to the Supreme Court after Thomas M. Foley had filed therein a petition for a writ of mandate to be directed to Ray L. Riley, as State Controller of the State of California, to require respondent to pay petitioner sum claimed to be due.

Order in accordance with opinion.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellant Riley.

Leo R. Friedman and William A. Lahanier, both of San Francisco, for petitioner Foley.

P. H. Johnson, of Sacramento, for respondent Brennan.

U. S. Webb, Atty. Gen., for respondent Riley.

PER CURIAM.

The first of the above-entitled cases was brought by John P. Brennan in the superior court of Sacramento county for the purpose of securing a peremptory writ of mandate directing the controller of the state to issue a warrant in petitioner's favor directing the treasurer of the state to pay petitioner the sum of \$500 as salary for the month of December, 1934, as chairman of the Veterans' Welfare Board. By amendment the prayer was changed to ask that warrant issue for \$416.66 upon the allegation that the Board of Control, with the approval of the Governor, had fixed the salary at \$5,000 per annum. The peremptory writ was issued and respondent appealed from the judgment to the District Court of Appeal. By reason of the filing in this court of the second action, we transferred the cause here in order that both might be determined at the same time. The second action is one brought by Thomas M. Foley, seeking a writ of mandate to compel the controller to issue him a warrant for \$500 as salary for the month of January, 1935, as the director of the Department of Military and Veterans' Affairs. The argument of the parties proceeds upon the theory that both petitioners claim to occupy the same office, which situation grows out of the following circumstances:

Section 3 of the California Veterans' Welfare Act (Deering's Gen. Laws, 1931, Act 7747, p. 4318) provides in part as follows:

"For the purposes of this act the 'veterans welfare board' is hereby created. This board shall consist of five members to be appointed by the governor to hold office for a term of four years and until their successors have been appointed and shall qualify. Four of such members shall be veterans. Of the members first appointed one shall be appointed to hold office until the first day of January, 1922, one until the first day of January, 1923, one until the first day of January, 1924, and two until the first day of January, 1925. *The governor shall designate one of the veteran members as chairman of the board and director of veterans' wel-*

fare. The secretary may or may not be a member of the board.

"Each member of the board other than the chairman and other than the secretary, if he be a member of the board, shall receive for each day's attendance at each meeting of the board a per diem to be fixed by the state board of control with the approval of the governor, and shall also receive the same per diem for each day spent in performing any duty required of him under the direction of the board in the performance of its official duties. The chairman shall receive a salary to be fixed by the state board of control with the approval of the governor. The members shall also receive their actual necessary traveling expenses in the discharge of their duties. Each member of the board shall be a civil executive officer." (Italics ours.)

In 1933 former sections 374, 374a to 374f, both inclusive, Pol. Code (all enacted in 1929), were incorporated into the Military Code (Stats. 1933, pp. 2501-2503), and from it we quote material provisions as follows:

"11. The Department. There is in the State government a Department of Military and Veterans' Affairs.

"12. The Director. The department shall be conducted by an executive officer known as the Director of Military and Veterans' Affairs. The director shall be appointed from the chiefs of the divisions of the department by and hold office at the pleasure of the Governor and shall receive a salary of six thousand dollars per annum and all his actual and necessary traveling expenses incurred in the performance of his duties. He shall be a member of the Governor's Council. He shall have only such powers and duties, and such jurisdiction and control over the divisions of the department, as may be vested in him or authorized by law or by any division of the department.

"13. Bond. Before entering upon the duties of his office, he shall execute an official bond to the State of California in the penal sum of twenty-five thousand dollars conditioned upon the faithful performance of his duties.

"14. The Divisions. For the purpose of administration, the department shall be forthwith organized by the director in such manner as he shall deem necessary and proper to conduct the work of the

department and shall be divided into four divisions as follows: * * *

"(b) Veterans' Welfare. The Division of Veterans' Welfare, which shall be administered by the Veterans' Welfare Board, the chairman of said board being the chief of the division."

It appears from the record that John P. Brennan was first appointed a member of the Veterans' Welfare Board on January 12, 1932, for the term ending January 1, 1936. On May 23, 1932, he was designated by the Governor as chairman of the board in the place of Allen B. Bixby, resigned, and on February 20, 1933, was appointed to the vacancy created by the expiration of Bixby's term, which new term would expire January 1, 1937.

On December 6, 1934, Thomas M. Foley was appointed a member of the board to fill the vacancy caused by the resignation of Walter B. Kibbey. At the same time the Governor designated Foley as chairman of the board and also as Director of Military and Veterans' Affairs. On January 1, 1935, Foley was reappointed and redesignated.

[1] Inasmuch as both claimants to the office of chairman of the Veterans' Welfare Board have brought action against the controller, neither of them raise any question concerning the right of the court to determine title to the office in a proceeding of this character. It is well, however, to bear in mind the rule announced, together with its limitation, in *McKannay v. Horton*, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. In other words, as there, we may inquire into the question of who is the occupant of the office for the purpose of determining to whom the salary is payable.

Some contention is advanced concerning the bond of Brennan, but our examination of the record discloses that he had filed an enforceable bond and that no question may legitimately be raised concerning it. Nor can it be seriously contended that he was not a member of the board and chairman thereof to and including December 6, 1934.

[2] We now come to the main and determinative question of whether the office of chairman is annexed to a membership on the board for the term of that membership, when the person occupying that position has once been designated by the Governor, or whether the chairmanship is held at the pleasure of the appointing power. Counsel for Brennan rely upon authorities from other jurisdictions dealing with special statutes applying to boards of commissioners and the selection of a presiding officer upon the organization of the board. We think these cases fall short of the mark, because of constitutional and statutory provisions. In article 20 of the Constitution dealing with miscellaneous subjects, and in section 16 thereof, we find the following: "When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment. * * *". And section 878 of the Political Code reads as follows: "Every office of which the duration is not fixed by law is held at the pleasure of the appointing power." By the wording of the section authorizing the appointment of the board and the designation of one of the veteran members as chairman it is manifest that the office of chairman is separate from the office of a member—hence the term of the chairman is not fixed. Under such circumstances we are bound to conclude that the office of chairman is held at the pleasure of the appointing power.

[3] As we have already observed, the petitioner Brennan occupied the office to and until December 7, 1934, and the petitioner Foley has held it since that time. Brennan is entitled to that part of the salary for which he has served and Foley thereafter.

The judgment in the case of *Brennan v. Riley* is reversed, with instructions to the trial court to enter judgment in accordance herewith, and it is ordered that the peremptory writ issue in the case of *Foley v. Riley*.

**LAW CREDIT CO. v. MERCHANTS NAT.
TRUST & SAVINGS BANK et al.****HAMMOND LUMBER CO. v. BANK OF
AMERICA NAT. TRUST & SAVINGS
ASS'N.**

Civ. 10097.

District Court of Appeal, Second District,
Division 2, California.

June 21, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.**1. Garnishment ⇨56**

Where debtor recovered judgment against bank for stock wrongfully withheld and pending appeal stock was liquidated and bank placed proceeds to debtor's credit in "special deposit" awaiting final determination of action, such fund was subject to garnishment by debtor's creditor, since, as debtor owned such stock when action was commenced, he was entitled to fund when garnishment issued.

2. Garnishment ⇨32

Where debtor recovered judgment against bank for stock wrongfully withheld, and pending appeal stock was liquidated and bank placed proceeds to debtor's credit in "special deposit" awaiting final termination of action, bank was not trustee of fund so as to preclude garnishment, since fund was held by bank merely as bailee or depositary.

3. Garnishment ⇨130

Where bank took possession of stock with knowledge that debtor had claim against party, from whom bank obtained stock, for wrongful pledge of stock to such party, bank paying assessments on stock did so at its peril and could not set off against debtor or debtor's garnishor amounts paid on assessments.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Garnishment proceeding by the Law Credit Company against the Merchants National Trust & Savings Bank and others, wherein the Hammond Lumber Company filed a cross-complaint against the Bank of America National Trust & Savings Association (substituted for Bank of America of California). From a judgment denying the garnishment, cross-complainant appeals.

Reversed.

Horton & Horton, Joseph K. Horton, and Holbrook, Taylor, Tarr & Horton, all of Los Angeles, for appellant.

Freston & Files, of Los Angeles, and Louis Ferrari, of San Francisco (Edmund Nelson, of Los Angeles, of counsel), for respondent.

CRAIL, Justice.

This appeal is from a judgment holding that certain moneys were not subject to garnishment. The writ of garnishment was issued in behalf of the Hammond Lumber Company, which is the appellant in this action. The Ripley Improvement Company, hereinafter called Ripley, was the principal debtor. The writ was served on the Merchants National Trust & Savings Bank, as garnishee. That bank, together with the Hellman Commercial Trust & Savings Bank, the Bank of America of California, and the Bank of America National Trust & Savings Association, which latter is the respondent herein, are frequently mentioned in the record. Because of succession and unity of interest, these four banks may be considered as one entity. In order to save confusion we are adopting respondent's suggestion that these banks be referred to as "the bank" where the context permits. The respondent says, "A single question is presented, and that is: whether the writ of garnishment at the time it was served made the garnishee liable with respect to a certain sum of money in its hands."

The moneys sought to be reached by the garnishment were on deposit with the bank under written stipulations entered into between the parties to an action brought by Ripley against the bank to recover certain shares of corporate stock which Ripley owned and to the possession of which Ripley was entitled, but which the bank refused to deliver to Ripley. That action at the time of the garnishment, was on appeal from a judgment requiring the return of the stock to Ripley. The stipulations provided in effect that the corporate stock should be liquidated and that all of the proceeds of the liquidation should be deposited with the bank in lieu of the corporate stock, and that "the said moneys be held in a special deposit carrying interest at 4% per annum to await the final determination of this action." Respondent puts it tersely, as follows: "If the bank won, it would be the bank's money. If Ripley won, it would be Ripley's money." And Ripley won. It was the clear purpose and intent of the stipulations that the money should be substituted

for the corporate stock. The stipulations contained the provision that the deposit "shall be without prejudice to the parties hereto."

[1] The respondent contends that the garnishment created no liability on the garnishee, because at the time of the levy of the writ the money was not due to Ripley nor was it certain to become due at a subsequent time, but that its payment was contingent upon the final determination of the action on appeal. However, the corporate stock was due to Ripley at the time the suit for the recovery of the stock was commenced. It was due just as much then as it was when the judgment for its return was entered or when the judgment was affirmed on appeal. The fact that the stock was wrongfully withheld and thrown into litigation is no basis for the claim that it was not due. Money or property which is due can be wrongfully withheld and thrown into litigation. A judgment that it be returned or paid does not make it due. Such judgment is rendered because the property or money was due at the commencement of the action. As the money under the stipulations merely took the place of the stock without prejudice to the parties, it was due even though it was withheld, as the stock had been withheld. Respondent contends that in any garnishment proceeding the principal debtor must have a right of action at law against the garnishee before garnishment can become effective, citing *Walker v. Doak*, 210 Cal. 30, 290 P. 290. In this case the principal debtor not only had a right of action at law but he had commenced the action and had prosecuted it to judgment.

[2] Respondent also contends that the moneys on deposit under the stipulations are held by the bank as trustee and are therefore free from garnishment. However, the funds are held by the bank as bailee or as depository, and as such are subject to garnishment.

[3] And finally respondent contends that if it be held that the funds on deposit with the bank are available to the writ of garnishment, then, nevertheless, the bank is entitled to offset, by reason of assessments upon the stock paid by the bank from August, 1923, to July, 1925, amounts which with interest thereon amounted to \$6,850, at the time the Ripley case was finally decided. When the bank took over from the Peoples Trust & Savings Bank of River-

side Ripley's corporate stock and the collateral note which the stock secured, the bank was not an innocent purchaser for value but held the same subject to existing equities and defenses which Ripley might have. Under these conditions whatever assessments on the stock were paid by the bank were paid at the bank's own peril. The bank knew when it exacted from Ripley the payment of \$38,000 to redeem Ripley's bonds, which were wrongfully pledged to the bank, that Ripley had a claim against the Peoples Trust & Savings Bank on account of the unauthorized and wrongful pledge by it of said bonds to the bank. This was before any of the assessments were paid by the bank. Moreover, the bank had in its possession several times \$6,850, against which Ripley had a legal right to offset any moneys paid by the bank on account of the assessments, as will appear from the following quotation from the opinion of the District Court of Appeal in the case of *Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank*, 90 Cal. App. 83, at page 91, 265 P. 835, 838, which is the case in which the right of Ripley to the return of the stock was finally determined, to wit: "It is not contended by the appellants (the bank herein) that the bonds in question, at the time they were turned over to the Hellman Bank by People's Bank were not the property of the plaintiff (Ripley), or that when the Hellman Bank received them, it had a legal right to their possession. * * * We are of the opinion that at no time did the Hellman Bank have any right to retain the bonds in question and had no legal right to exact the payment of \$38,000 from the plaintiff (Ripley) as a condition to delivery of the bonds to plaintiff." The words in parentheses are put in by us for clearness. Under these facts the bank would not be entitled to offset against Ripley or against Ripley's garnishor the amounts paid on the assessments.

From the foregoing it appears that there is no reason why the bank should not be made to respond to the garnishment of appellant. The judgment is reversed, with instructions to the trial court to enter judgment for the moneys deposited under the stipulations, together with the interest which has accumulated thereon.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

**EL CLARO OIL & GAS CO. v. BANK
OF CORNING.**

Civ. 10167.

District Court of Appeal, Second District,
Division 2, California.

June 19, 1935.

Hearing Denied by Supreme Court
Aug. 16, 1935.**Venue ⇐70**

Where plaintiff in action for money received showed that contract was made in Los Angeles county, that plaintiff's check on Los Angeles bank was delivered to defendant and paid in such county, and that breach of contract giving rise to plaintiff's action to recover amount of check occurred in such county, denial of defendant's motion for change of venue to county of corporate defendant's principal place of business held not error (Const. art. 12, § 16).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by El Claro Oil & Gas Company against the Bank of Corning. From an order denying defendant's motion for a change of venue to county of defendant's principal place of business, defendant appeals.

Affirmed.

Mark M. Cohen and Irwin M. Fulop, both of Los Angeles, and George R. Freeman, of Willows, for appellant.

Arthur C. Fisher, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff brought suit on a common count for money had and received, and defendant moved for a change of venue to the county of Tehama, where it has its principal place of business. Supporting and opposing affidavits were filed and the motion was denied. From the order denying such motion defendant appeals.

The Constitution of California, article 12, § 16, provides that a corporation "may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Certain transactions had taken place between the parties herein, culminating in execution and delivery by plaintiff

to defendant of a check on a Los Angeles bank, which was paid upon presentation. Plaintiff brought this suit to recover the amount of the check. The affidavit filed on behalf of plaintiff in opposition to the motion sets out in general terms that the contract on which this action is predicated was made in the county of Los Angeles, that the money sued for was paid there, that the original obligation arose there, and "that the breach of the obligation (if any breach occurred) occurred in the city of Los Angeles, county of Los Angeles, state of California, at the time the sum of \$5,000 was paid by the Citizens National Trust & Savings Bank." Upon such showing we cannot set aside the ruling of the trial court. *Bowers v. Modoc Land & Live-Stock Co.*, 117 Cal. 50, 48 P. 979; *Raphael v. People's Bank of Benicia*, 45 Cal. App. 115, 187 P. 53.

Order affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.

**SHUEY v. ASBURY. ***

Civ. 10308.

District Court of Appeal, Second District,
Division 2, California.

June 25, 1935.

Hearing Granted by Supreme Court
Aug. 22, 1935.**Appeal and error ⇐1066**

In action for injuries sustained in automobile collision, where evidence was sufficient to support verdict for defendant, instruction that defendant was negligent as matter of law for violating speed law held reversible error, since instruction directed jury's attention to sole question of speed and withdrew from their consideration circumstances attending collision (St. 1931, p. 2120, § 113 (d)).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Olga Shuey against Ruth Asbury, sometimes known as Ruth Eyraud, Jr. From a judgment for plaintiff, defendant appeals.

Reversed.

Joe Crider, Jr., of Los Angeles, for appellant.

Paul Blackwood and Bingham Gray, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment against defendant for injuries resulting from an automobile collision, from which the latter appeals.

The jury was instructed at the request of plaintiff as follows: "You are instructed that section 113 of the California Vehicle Act provides that in business districts such as the one described in this case, that the driver of any motor vehicle shall drive the same at a speed not exceeding twenty miles per hour. This act in itself is negligence as a matter of law, and if you believe from the evidence that defendant at the time and place was driving in excess of twenty miles per hour and that such negligence was the sole proximate cause of the accident and injuries, if any, to the plaintiff herein, then your verdict should be for the plaintiff and against the defendant." Although it is conceded that the instruction was erroneous in view of the express provisions of subdivision (d) of said section 113 (St. 1923, p. 553, as amended by St. 1931, p. 2120), respondent urges that no miscarriage of justice resulted, and that the conclusion reached by the jury would have been the same even if the erroneous instruction had been withheld.

Appellant was driving south on La Brea avenue in the city of Los Angeles at about 6:30 o'clock in the evening of April 21. Respondent had been in a parking lot on the west side of La Brea between Rosewood and Oakwood avenues, and went southeast for a short distance as she entered La Brea, intending to go south on that avenue. She cleared the curbing with her car and paused to permit two busses to pass in front of her. Thereupon the car of appellant could be seen at the intersecting street to the north, and respondent estimated its speed to be from forty to forty-five miles per hour. Appellant testified that the car of respondent appeared to be slowly moving into the street and that she attempted to pass to the right of it rather than risk a head-on impact with a northbound car, which she apprehended if she tried to pass respondent's car on its left.

The jury concluded that respondent was not guilty of contributory negligence. Whether they would have decided that appellant was negligent as a matter of fact if the erroneous instruction had not been

given is a question that we are unable to answer, and must therefore hold that the giving of the instruction assailed was prejudicially erroneous, notwithstanding that we have in mind the rule announced in *Potter v. Driver*, 97 Cal. App. 311, 275 P. 526, and *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125, *Hatzakorjian v. Rucker-Fulmer Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027, and *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066, requiring alertness on the part of the operator of a motor vehicle and a continuing control which will enable him to meet emergencies.

In *Noble v. Miles*, 129 Cal. App. 724, 19 P. (2d) 265, 266, the statement of the court relied on by respondent must be read in the light of the further portion of the opinion which we have italicized: "Conceding also that the instructions did not properly state the law, it must nevertheless appear that such error would not justify a reversal of the judgment unless it is probable that the result of the trial would have been different if the instruction had been otherwise. We have read the transcript of the evidence, and we are of the opinion that the findings of the jury would have been the same irrespective of any instruction relative to statutory speed limit. *As a matter of fact the speed of the cars involved was not particularly stressed and had to do only with the defense of contributory negligence. No contention is made that the verdict was unsupported by the evidence.*"

In this case the evidence would support a verdict for appellant, and under a correct instruction there might have been a verdict in her favor. The attention of the jury was directed to the sole question of speed. All attendant circumstances of other traffic, the confusing light of early evening, and the element of surprise, which doubtless attended the discovery by appellant of the other car projecting into the street at such an angle that its movements may not have been fully observable, should have been fully considered by the jury and were in effect withdrawn from their discussion by the instruction here considered, since it was conceded that appellant's speed was in excess of the twenty-mile limit. Appellant is entitled to a new trial. *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P.(2d) 58; *Johnson v. Gokey*, (Cal. App.) 41 P.(2d) 193, and cases therein cited.

Judgment reversed.

We concur: CRAIL, J.; STEPHENS, P. J.

SWYNY v. CAYLOR et al.

Civ. 9412.

District Court of Appeal, Second District,
Division 2, California.

June 14, 1935.

Rehearing Denied July 11, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.**1. Landlord and tenant ⇨169(6)**

In action for injuries sustained when door, to which folding bed being occupied by plaintiff was attached, fell across bed, evidence *held* not to justify recovery on ground that fitting in header and pivot pin at top of door were "bootleg" fittings, which by reason of their inadaptability and manner of installation caused accident.

2. Landlord and tenant ⇨169(6)

In action for injuries sustained when door, to which folding bed being occupied by plaintiff was attached, fell across bed, evidence *held* not to justify recovery on ground that defendants knew of defect in mechanics of bed which caused accident.

3. Evidence ⇨19

It is not common knowledge that by reason of type of fittings used the solid movable pin, at top of door to which folding bed was attached, would by the swinging of door creep and move up and allow door to fall.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Helena Swyny, by Kathleen Swyny, guardian ad litem, against R. E. Caylor and Mattie Caylor, doing business under the fictitious name and style of the Harcourt Apartments. From a judgment in favor of plaintiff, defendants appeal.

Reversed.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for appellants.

E. Neal Ames, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Plaintiff and her sister rented an apartment from appellants on November 1, 1931, and occupied the same up to March 16, 1932, on which day a door, to which the folding bed being occupied by them was attached, fell across the bed, causing the personal injuries for which plaintiff recovered damages in the trial court.

The testimony in the record is at many points ambiguous and unintelligible, being

replete with descriptions, demonstrations, and illustrations by various witnesses of the construction, installation, operation, and condition of the door, bed, and attached hardware, which testimony and the questions of counsel repeatedly employ the words "this," "that," "this way," "that way," "here," and "there," without any indication in the record as to what the witness had reference or the physical demonstration accompanying the testimony. While such testimony was no doubt understandable to the trial court and jury, it is of no assistance to an appellate tribunal which has before it only the words of the witnesses.

[1] The facts, as we are able to gather them from the record, are that on March 16, 1932, respondent and her sister retired, and shortly after they fell asleep the door to which the head of the folding bed was attached fell across the bed, severely injuring respondent. The bed was a "Marshall-Stearns" folding bed, with the head thereof attached to the door of a closet, the door being pivoted at the center of its top by fittings and a movable pin in the door and door frame, and pivoted at the center of the bottom edge of the door by a fixed pivot with a conical tip resting in a corresponding socket set in the floor. The foot end of the bed could be raised and the bed thus folded up against the door, and while in that position the door could be revolved to move the bed out of or into the closet. The bed and door formed one complete device and were both made by Marshall-Stearns Company. Both parties agree that the fittings constituting the fixed pivot at the bottom of the door were standard Marshall-Stearns fittings. Appellants contend this was also true of the fittings at the top of the door, but respondent contends that, while the top fitting in the door itself was of Marshall-Stearns manufacture, the fitting in the door frame or header and the pin which constituted the pivot at the top were not Marshall-Stearns fittings but "bootleg" fittings, which by reason of their inadaptability and the manner of installation caused the accident. The liability of appellants depends largely upon the correctness of this latter contention, which appellants assert is not supported by any evidence.

The contention that the fitting in the header at the center of the top of the doorway and the loose pivot pin inserted in the fittings at that point were not Marshall-Stearns fittings is based upon the testimony

of one Winters that he had for a number of years been employed in the installation of folding beds and Marshall-Stearns fixtures, and that as long as he worked for the Marshall-Stearns Company and its representatives the pin was—"as far as I know * * * it has always been a piece of pipe." When asked as to the solid pin which came from the bed here involved, Winters testified: "I have never seen any like that, either." As to the flat plate in the top of the doorway, or "header," the witness stated: "I don't remember ever seeing any like that." Obviously the fact that the witness had not seen or did not remember seeing such fittings in the course of his employment established merely that the witness was unacquainted with them. This did not establish the fact that the fittings used were not Marshall-Stearns fittings, and is merely negative testimony. The distributor of Marshall-Stearns beds testified that the solid pin which was used in the bed in question and the fitting in the top of the door were Marshall-Stearns fittings; that the bed fittings were furnished and installed by Marshall-Stearns and that he himself sold the bed in question and had it installed. As against this positive, uncontradicted, and reasonable testimony the negative testimony of the witness Winters has so little probative force that the testimony of the witness who sold and installed the bed must be taken as true. *Beecher v. Stafford*, 83 Cal. App. 408, 256 P. 870.

It may also be noted that the hole in the fittings in the top of the door, conceded by both parties to be a Marshall-Stearns fitting, is five-eighths of an inch in diameter, and that the solid pin which was in the door is slightly less than five-eighths of an inch in diameter, but that the fittings introduced in evidence by respondent to illustrate the type of Marshall-Stearns fittings with which a hollow pin or piece of pipe was intended to be used have holes three-fourths of an inch in diameter. As the hollow pin used with such fittings would be only slightly less than three-fourths of an inch in diameter, it is obvious that a pin of that size could not have been inserted in the fittings in the door or header, both of which had only five-eighths inch holes. There is also testimony of an experienced mechanic that the fitting in the header had never been removed.

We must conclude that the fittings in the door were Marshall-Stearns fittings, and that they were the fittings used when the bed was originally installed.

[2] Respondent's contention that appellants knew of the defect in the mechanics of the bed which caused the accident is based upon the fact that to appellants' knowledge a crack in the door was repaired in 1928 and that in 1932 the bed after being folded fell back into the closet. It appears that the repair in 1928 made the door as good as new, and that the fall of the bed on the subsequent occasion was not due to any break, damage, or defect of the door or bed, but to the fact that an excessive amount of bed clothing interfered with the secure closing of the bed. Neither of these occurrences involved the pivots of the bed; there is no evidence that either pivot was injured on either of these occasions, and there is shown no causal connection between those incidents and the accident here involved. We believe there is no evidence to support the conclusion that appellants had any knowledge of that which caused the accident.

Respondent's cause of action and right to recover damages is based upon the contention that the door fell because of defective mechanism causing the pin forming the pivot at the top of the door to work upward into the uppermost fitting and header until such pin left the door, which then, being without support at the top, fell forward over the bed. This theory is based upon the fact that there was nothing in the type of construction which would prevent the pin from going upward to such extent, but that the construction was such that the pin could not have dropped down into the door far enough to clear the fitting in the heading. Respondent relies, as support for this theory, upon the fact that shortly after she was removed from the bed by persons who rushed in after the accident, the solid pivot pin from the top of the door was found inside and on the floor of the closet. The theory of respondent is based on the premise that there can be no other cause for the falling of the door. In presenting her argument respondent asserts that the construction of the fittings was such as to cause the solid pivot pin to slant in the fittings, and therefore to creep and work upward by reason of the movement of the door; but the sole discoverable basis for this claim is the assertion of her counsel. The assertion overlooks the fact, shown by an examination of the exhibits, that the fitting in the top of the door consisted of a metal plate with a hollow sleeve or barrel set at right angles, the sleeve being about three inches long, the pin fitting into the hole through the sleeve much as a piston in a cy-

linder, and that this fitting alone would not permit the claimed slanting of the pin, regardless of whether the fitting in the header was of the type used or of the sleeve type. The finding of the pin in the closet, while not inconsistent with the theory that it fell there out of the top of the door casing, is not inconsistent with the various other theories which present themselves. Even respondent's counsel apparently realized this, since he suggests at one point in his brief that the pin "bounced back into the closet." Even conceding, however, that the pin fell directly to the spot where it was found, this does not establish whether it fell from the header or was jarred from the top fitting of the door.

[3] There being an absence of evidence to prove the fact, respondent urges that it is a matter of common knowledge that by reason of the type of fittings used the solid movable pin would by the swinging of the door creep and move up and allow the door to fall. We cannot agree that this is a matter of common knowledge and that the jury could, without evidence, indulge in the assumption that the pin was thus caused to move upward. No proof was offered that such a physical result had ever occurred under similar conditions or by evidence of experiments, and the expert evidence tendered by respondent was excluded by the trial court, although in our opinion the subject-matter was one in which expert testimony was admissible. It was uncontradicted that, in addition to its use by former tenants for several years, respondent and her sister had used the bed for four and a half months prior to the accident, had noticed nothing to indicate that it was not in good mechanical condition, and that the door during all this time swung around very easily.

The statement by one of appellants, made after the accident, that she did not know why the bed had fallen, unless it "might have been" sprung or damaged at the time it fell back into the closet, is of no effect as proof of how the accident occurred, since it amounts merely to a speculation of a person who, having no knowledge or opinion of the cause of the accident, was groping for a possible theory.

The case of Fisher v. Pennington, 116 Cal. App. 248, 2 P.(2d) 518, which respondent contends is directly in point, is readily distinguishable from the case at bar, for in that case it appeared that the floor below the door had sagged so far that by the resultant

lowering of the door the upper-pivot pin extended but one-fourth of an inch into the header fitting, so that the placing of an appreciable weight on the bed would cause the pivot pin to pull out of the fitting and the door would fall. There the cause for the falling of the door was clearly demonstrated; here it is left to conjecture and speculation; and there is a total absence of proof as to what caused it to fall, and consequently no proof upon which a liability for damages could be imposed upon appellants.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



7 Cal.App.2d 573

McGRATH et al. v. BASICH BROS. CONST.

CO. et al.

Civ. 9491.

District Court of Appeal, First District,
Division 1, California.

June 14, 1935.

Hearing Denied by Supreme Court
Aug. 12, 1935.

1. Evidence ⇨574

Relative weight between conflicting scientific testimony and circumstantial evidence as to facts is to be determined by jury or trial court.

2. Explosives ⇨12

Doctrine that one must so use his own rights as not to infringe upon rights of another when considered with facts established by evidence and when no act of injured party is proximate cause of accident is applicable to blasting cases (Civ. Code, § 3514).

3. Explosives ⇨12

Where property is injured directly and proximately by performance of act, without interposition of any external or independent agency which was not or could not be foreseen, liability exists regardless of any elements of negligence, and it is immaterial whether injuries were caused by shaking of earth or pulsation of the air, or by physical projectiles or missiles.

4. Explosives ⇨12

Doctrine that one should so use his own property as not to injure that of another is not restricted in application in blasting cases to instances where operation of instrumentality is nuisance per se, or when land is contiguous or adjoining.

5. Explosives ☞12

Although explosion of black granulated powder in place properly selected and protected is not nuisance per se if injury occurs to person or property, it is sufficient basis upon which to predicate liability if act of firing is sole, efficient, and proximate cause of injury.

6. Nuisance ☞5

If injury results from performance of lawful, voluntary, but dangerous act, actor shoulders responsibility and must respond in damages.

7. Explosives ☞12

In action for damages to property from blasting, that defendant was road contractor and not landowner did not preclude liability, since it is effect of use of an instrumentality irrespective of ownership that determines character of injury and liability therefor.

8. Appeal and error ☞996

All reasonable inferences are to be indulged to support a finding.

9. Explosives ☞12

In action for damage to property from blasting where defendant's answer raised issue of negligence, and it was clear that blasting was not done in accordance with plans prepared therefor, and it was not unreasonable to infer that unskillful manner of preparing holes for powder and firing thereof were proximate cause of damage, finding that defendant was negligent *held* not unwarranted (Code Civ. Proc. § 462).

10. Explosives ☞12

Independent road contractor *held* solely liable for damage caused by negligent blasting where contract provided therefor, and there was no evidence indicating that plans and profiles specified by state were defective, or that instructions given by state caused damage to plaintiff's home.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Martin McGrath and Ellen McGrath, his wife, against the Basich Brothers Construction Company and others. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for appellants.

Francis W. Collins, of Martinez, for respondents.

WARD, Justice pro tem.

The defendant corporation, in the performance of a contract with the state of California to construct a highway through the county of Contra Costa, set off a blast as part of the work in the construction of the road. Plaintiffs owned a two-story house, used as a residence, distant from the scene of the blast approximately 1,100 feet. Immediately after the blast it was discovered, among other breakage, that the house had been moved on its foundations, the front porch separated from the building, and certain windows had been pulled away from their casings. There is no evidence that any of these conditions existed prior to the blast. The trial court rendered judgment for the plaintiffs in the sum of \$1,805, and defendant appealed. Appellant did not introduce any testimony relative to the costs of repair or the amount of damages sustained, except by cross-examination of the witnesses called by plaintiffs. There is evidence substantiating the finding relative to the amount.

[1] Appellant contends that the damage to plaintiffs' home is scientifically impossible as a result of the blast discharged by defendant. In support thereof several expert witnesses, experienced in supervising "shots of rather questionable character," were called and testified that the nature of damage to buildings from blasting operations is somewhat similar to those caused by an earthquake; that, considering the ground and locality and the amount of black powder used, the blast could not under any conditions cause damage to any building 500 feet from the point of discharge. The principal expert witness testified that the amount of force that could be generated by a shot similar to the shot in question was "only a matter of opinion." Against this opinion testimony was the uncontradicted evidence that the breakage in plaintiffs' home occurred at the exact time of the blast. The relative weight between conflicting scientific testimony and circumstantial evidence as to facts is to be determined by the jury or the trial court. *Rolland v. Porterfield*, 183 Cal. 466, 469, 191 P. 913.

[2, 3] Section 3514 of the Civil Code of California provides: "One must so use his own rights as not to infringe upon the rights of another." When considered with facts established by evidence and when no

act of the injured party is the proximate cause of the accident, this doctrine is applicable to blasting cases. *Colton v. Onderdonk*, 69 Cal. 155, 158, 159, 10 P. 395, 58 Am. Rep. 556. The employment of skillful and experienced engineers or the exercise of the highest degree of care may not always be a sufficient or adequate defense. *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 519, 24 P. 303, 18 Am. St. Rep. 248. It is the rule that where injury is caused to personal or real property directly and proximately by the performance of an act, without the interposition of any external or independent agency which was not or could not be foreseen, liability exists for consequential damages, regardless of any elements of negligence. *Green v. General Petroleum Corporation*, 205 Cal. 328, 334, 270 P. 952, 60 A. L. R. 475. It is immaterial whether the injuries were caused by the shaking of the earth or pulsation of the air or by physical projectiles or missiles. *McKenna v. Pacific Electric R. Co.*, 104 Cal. App. 538, 543, 286 P. 445.

[4] Appellant contends that the doctrine of *sic utere tuo ut alienum non laedas* is not applicable in blasting cases, except in the instances wherein the operation of the instrumentality is a nuisance per se or when the land is contiguous or adjoining. It is true that the authorities in California upholding this maxim are cases which might be deemed to be nuisances per se or the lands were adjoining, but it was not intended that the doctrine should be so narrowly restricted. It is easy to conceive of an explosion resulting in damage to contiguous or adjacent property or even to property in the neighborhood, or perhaps far distant from the neighborhood, and still no damage occur to the adjoining property. To confine the rule within appellant's contention might work a grave injustice to noncontiguous property owners.

[5,6] This case was not tried upon the theory that the building of the road or the use of the explosives in the construction thereof was a nuisance. The explosion of black granulated powder in a place properly selected and protected is not a nuisance per se (*Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 506, 93 P. 82, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159), but if injury occurs to person or property it is a sufficient basis upon which to predicate liability if as in this case the act of firing the powder was the sole, efficient, and

proximate cause of injury. *Nola v. Orlando*, 119 Cal. App. 518, 519, 6 P.(2d) 984. If an injury occurs resulting from the performance of a lawful, voluntary but dangerous or perilous act, the actor shoulders the responsibility and must respond in damages. The general rule is that one even when backed by authority of the state must so use his rights as not to infringe upon the rights of another in the enjoyment of life or in the possession of property.

[7] There is no merit in the contention that the defendant was a contractor to build a road and not a landowner. It is the effect of the use of an instrumentality irrespective of ownership that determines the character of the injury and the liability therefor.

[8,9] Negligence on the part of the defendant was not alleged in the complaint. The answer sets forth that the work was performed in a prudent and careful manner, thereby raising the issue of negligence. Section 462, Code Civ. Proc. The court found that the defendant did not perform the blasting operation in a prudent and careful manner. A witness for defendant testified that the holes prepared for the reception of the explosive were "not near the bottom as they should have been" and that the operator of the discharge "wanted to put more powder in, and he probably would have wrecked the town, if he put more powder in." It is clear that the blast was not conducted in accordance with the plans and specifications prepared therefor. The trial court found that the defendant was negligent. If the blast was the proximate cause of the damage, it is not unreasonable to draw the inference that the unskillful manner of preparation of the holes for the powder and the firing thereof were the proximate cause of the damage. All reasonable inferences are to be indulged to support a finding. *Hoppe v. Robb*, 1 Cal. 373. This court is not in a position to hold that this finding was wholly unwarranted.

[10] Appellant was an independent contractor acting under the authority of the state of California and engaged to consummate the building of the road in question. The contract provided that the builder of the road should be responsible for damage to person or property during the progress of the work. There was no evidence indicating that the plans and profiles specified by the state were defective or that instruc-

tions given by the state caused the damage to plaintiffs' home. Under such circumstances, the independent contractor is solely liable. *Buckingham v. Commary-Peterson Co.*, 39 Cal. App. 154, 178 P. 318.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



7 Cal.App.2d 683

UNITED STATES FIDELITY & GUARANTY CO. v. AMERICAN BLDG. MAINTENANCE CO. OF LOS ANGELES.

SAME v. AMERICAN BLDG. MAINTENANCE CO. OF SAN FRANCISCO.
Civ. 9634, 9635.

District Court of Appeal, First District,
Division 1, California.
June 20, 1935.

Rehearing Denied July 20, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.

1. Insurance ⇨146(3)

Compensation policy is subject to same general rules as contracts of insurance generally, and when such policy is uncertain as to operations intended to be covered, policy will be construed most strongly against insurer who drew it and caused uncertainty to exist (St. 1917, p. 831, as amended; Civ. Code, § 1654).

2. Insurance ⇨183

Provision of insurance rate manual applying to enterprises which operate "within" a building and conducting of work "in a separate building," and wherein words "floors" and "partitions" were mentioned, *held* not intended to apply to concern doing janitorial service, where work is upon or about the building (Civ. Code, § 1654).

3. Insurance ⇨183

Under compensation and liability policies covering employees engaged in care, custody, and maintenance of premises, operation of elevators, heating, lighting, and power apparatus, insured could conduct window cleaning in any manner they wished, and such operations did not take increased rate provided for business of window washing, provided window cleaning was not principal business of insured.

4. Insurance ⇨183

Provision of insurance rate manual that policy correction required by bureau which changes wording of any classification involving increase in rate must be accepted by insured and copy of correcting endorsement must be filed with bureau and must bear signature of insured evidencing acceptance *held* inapplicable to insurer's action for premiums based on increased rate, where endorsements did not change wording of any classification, but simply notified insured that earned premiums under compensation and liability policies would be calculated upon increased percentage.

5. Insurance ⇨183

Insured under compensation and liability policies *held* liable for increased premiums as indicated by endorsements attached to policies, where rate increases were lawfully put into effect under terms of policies.

6. Interest ⇨19(1)

Liquidated claim, whether oral or written, carries with it as matter of law interest from time it is due, in absence of agreement to contrary, and claim is "liquidated" when amount due or to become due is fixed by law or by agreement between parties.

[Ed. Note.—For other definitions of "Liquidated," see Words & Phrases.]

7. Interest ⇨19(1)

Premiums under compensation and liability policies which were not due until final adjustment *held* "unliquidated claim," and hence interest was not recoverable thereon, as against contention that because insured failed upon demand to permit insurer to inspect books additional premiums became liquidated claim.

[Ed. Note.—For other definitions of "Unliquidated Claim," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Actions by the United States Fidelity & Guaranty Company against the American Building Maintenance Company of Los Angeles, and the American Building Maintenance Company of San Francisco. From judgments for plaintiff, defendants appeal.

Reversed, with directions.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellants.

Walter E. Drobisch and Horace W. B. Smith, both of San Francisco, for respondent.

TUTTLE, Justice pro tem.

These actions were brought to recover the balance of premiums alleged to have been due upon four policies of insurance, two of which were issued under the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended), and two under Contractors' Public Liability. The actions were tried separately, but consolidated upon this appeal. In one action judgment went for plaintiff in the sum of \$9,070.11, and in the other a recovery of \$4,304.45 was had. This appeal is prosecuted from said judgments, and is taken in each case upon the judgment roll alone.

The appellant in one action was doing business in Los Angeles; in the other the appellant was engaged in business in San Francisco. The business of both appellants was that of "building maintenance," which consists in rendering janitorial service, such as the caring for and cleaning buildings, including window cleaning, for owners or tenants. On February 5, 1928, respondent duly issued to each appellant one policy of workmen's compensation insurance and one policy of contractors' public liability insurance, and on February 5, 1929, these policies were renewed to cover another year. On May 17, 1930, respondent, the insurance carrier under all of said policies, filed its complaints against each appellant herein. The complaints are identical in form. Each sets forth the execution of the four policies, and alleges on information and belief that respondent had earned premiums in an amount in excess of the premium already paid by appellants; that the exact amount so earned could not be ascertained except through the action; and that appellants had refused, upon the demand of respondent, to permit the latter to inspect the pay rolls of appellants. It is prayed that the court ascertain the amount of premiums due from appellants, and that respondent have judgment for such amount after deducting the amount already paid to it as premiums due under said policies. Findings were made upon all issues in favor of respondent, and judgment was entered against appellant from San Francisco in the sum of \$9,070.11, and against the other appellant in the sum of \$4,304.45, these being the amounts in each case by which the earned premium, as disclosed by the books of respondent, exceeded the amount of premiums theretofore paid by appellants.

The main contention in the case arises over the construction of the manual of rates approved by the state insurance commis-

sioner. Although the cases are before us upon the judgment rolls alone, the parties have agreed upon the voluminous findings which appear to embody all pertinent portions of the manual necessary to a determination of the questions involved. The public liability policies are also subject to this manual. The rates in respect to such policies are much lower than upon the others, consequently recovery was had almost entirely upon the policies of workmen's compensation insurance.

In appellants' opening brief there are four "topics" presented and discussed, but nowhere is it pointed out just what error is relied upon for a reversal of the case. In answer to a challenge upon this matter by respondent, the closing brief of appellants finally makes the contention that the findings are insufficient to support the judgment. The findings, as we have stated, contain excerpts from the manual under which the business of appellants was classified in the matter of fixing the premium rates. It is urged that the court erred in such *classification* and thus greatly increased the amount of premium to be paid by appellants.

Referring to the contention last stated, each cause of action presents substantially the same question as the manual rates apply to both compensation insurance and public liability. We will consider the first cause of action based upon premiums due under a policy of workmen's compensation insurance. This policy, as written, classified appellants' business as follows:

Classification of Operations.	Rate per \$100, of Remuneration.
Buildings—operation (contractors) all employees engaged in care, custody and maintenance of prem- ises, the operation of elevators, heating, lighting and power ap- paratus; excluding extraordinary additions, alterations or repairs	\$1.42
\$9,014	

The foregoing statement of the nature of appellants' business operations is given under the main heading, "Declarations," and is presumed to be based upon information given by the assured. It will be observed that there is no express mention of "window cleaning" in such declaration, although that operation is mentioned in a footnote found in the rate manual under this classification. Respondent concedes, however, that the "care, custody and maintenance of premises" includes any window cleaning which may be necessarily involved in the operations mentioned. In setting up the rate basis of appellants' operations *as disclosed by the*

evidence, the trial court found that, due to the method of operation pursued by appellants, "window cleaning" did not come under the general classification No. 9014 as fixed in the policy, but that it was a *separate enterprise* and came under classification No. 9170. This finding is as follows:

Code	Classification of Work	Amount of Payroll	Rate	Earned Premium
9170	Window Cleaning	\$8,378.77	\$21.49	\$1,800.60

The foregoing classification, it will be observed, in respect to a portion of appellants' pay rolls, raised the rate fixed in the policy from \$1.42 per hundred to \$21.49 per hundred, and herein lies the burden of appellants' complaint, as almost their entire attack upon the findings is made in connection with their *window cleaning operations* and the proper rate to be applied to the same.

The court found that out of a total pay roll of \$304,070.17, only a small portion thereof, to wit, \$8,378.77, was classified as coming under rate No. 9170, notwithstanding, according to appellants, that their principal business was building maintenance, which included the "care and custody" of premises.

Respondent points out the following finding as the basis for the power of the trial court to thus raise the rate on a portion of the pay roll: "All the employees of defendant were, during each of said periods, engaged as shown by the various compilations hereinabove set forth, in the care, custody and maintenance of premises, the operation of elevators, heating, lighting and power apparatus; excluding extraordinary additions, alteration or repairs; including, however, window cleaning therein and as a part thereof, and during all of said times certain of the employees of defendant were exclusively engaged in performing window cleaning in buildings wherein defendant performed no other work than said window cleaning in or about the care, custody or maintenance of said premises, and the defendant paid the said employees so engaged in the operation last aforesaid during the respective periods covered by said policies, remuneration as shown by the various compilations hereinabove set forth opposite the classification 'Window Cleaning', being Code No. 9170; that at the time each of said policies was issued as aforesaid, defendant did not disclose to plaintiff that said employees last mentioned were engaged as last aforesaid; that during all of said times certain employees of defendant whose compensation was as shown in said compilation, were engaged in com-

missary work incidental to the maintenance of certain buildings."

[1] Assuming, as we must here, that this finding is true, will it support the judgment? This leads to a construction of the policies and the law governing the situation. At the outset it must be remembered that "a contract of compensation insurance is subject to the same general rules as contracts of insurance generally" (27 Cal. Jur., p. 558), and that "when a policy [of compensation insurance] is uncertain as to the operations intended to be covered, under section 1654 of the Civil Code the policy will be construed most strongly against the insurer who drew it and caused the uncertainty to exist" (27 Cal. Jur., p. 561). All matters relating to the classification of operations and rates to be applied and all matters of administrative detail are contained in the Manual of Rates approved by the state insurance commissioner, which manual is before the court, by stipulation, on this appeal. Would the fact that appellants "performed window cleaning in buildings wherein defendant performed no other work than said window cleaning" operate so as to take them out of the classification mentioned in the policy, No. 9014, and place them, as to a portion of their pay roll arising out of this work, under rate No. 9170, which is predicated upon "window cleaning" as a separate enterprise? Respondent has failed to cite any authority for such a change in classification. It quotes the following portion of the rate manual: "(b) If, however, there are Distinct Enterprises (meaning thereby operations which are specifically classified in this Manual but not operations normally prevailing in the business covered by the governing classification) conducted in a specific location of a given risk by the same employer and the Entire Work in Each Enterprise is conducted either in a Separate Building or on a Separate Floor or Floors of a Building, or on the Same Floor in Separate Departments divided by Structural Partitions without interchange of labor, the employer conducting each of such enterprises as a Separate Undertaking with Separate Records of Payroll, then such separate undertaking Shall Each be classified according to the Manual and the proper premium rate applied to Each."

[2] As we construe the foregoing portion of the manual, it applies to those enterprises which operate "*within*" a building, such as a manufacturing concern. This is evidenced by the mention of "floors" and "partitions," and the conducting of work "*in a separate building*." It was clearly never intended to

apply to a concern doing janitorial service, where the work is *upon* or *about* the building.

[3] It may be, as pointed out by respondent, that to permit appellants to do all their work under one classification which has a comparatively low rate would work an injustice to other concerns which do window cleaning and nothing else. The latter would obviously take the rating found by the court here. We believe this matter is one for the rate-making authorities to consider, and not the courts. We therefor hold that under the classification in the policy, appellants could conduct their window cleaning in any manner they wished, and that such operations would take the general rate covering the maintenance, care, and custody of buildings, as specified in the policy, provided that window cleaning *is not the principal business of the insured*. The finding of the trial court in the amount of pay roll arising out of *all* its operations, and the amount arising out of window cleaning *alone*, may be accepted as a finding that the principal business of the assured was *not* window cleaning, but *building maintenance*. There is no finding that the principal business of appellants was window cleaning. It follows, therefore, that the portion of the judgment which allows a recovery for increased premiums based upon this change of classification is erroneous, being without support in the findings.

We now take up the matter of the increase in the *rate* upon the business classified in the policy; "building maintenance." As we have stated, almost the entire pay roll of appellants was found by the court to come under classification No. 9014, where the policy rate was \$1.42 per hundred dollars. The court found, however, that the rate to be applied was not \$1.42, but \$1.99 per hundred. The increased rate was not brought about by any change in *classification*, but was due solely to the fact that after the policies were executed the *rate* was increased. When the policies of February 5, 1928, were issued, the rate was fixed at \$1.42. When the policies of February 5, 1929, were issued, they contained an attached endorsement to the effect that the rate was increased to 145 per cent. Appellants do not question the latter increase for the second year, but they strenuously insist that other increases in rates are contrary to law. They admit "that the 1929 endorsement increasing the premium to 145% was attached to the policy at the time of its issuance and that it thus became a part of the contract." It appears from the findings that on February 14, 1928, the

insurer mailed to appellants an endorsement to be attached to the policy, which notified the latter that the policy rate was increased to 140 per cent. On August 13, 1929, a similar document was mailed, raising the premium 4.1 per cent. Appellants do not question the right of the insurer to raise the rates, but they insist that the insurer did not follow the law in attempting to put the raised rates into effect. The rate manual, which is in effect the law, provides as follows: "Any policy correction required by the Bureau which changes the wording of any *classification* [italics ours] involving an increase in rate must be accepted by the assured and a copy of any such correcting endorsement must be filed with the Bureau and *must bear the signature of the assured evidencing such acceptance.*"

[4] We do not believe that the portion of the manual last quoted is applicable to the situation. The endorsements did not "change the wording of any classification." They did not purport to have anything to do with a classification, but left the classification in the policy just as it was written. They simply notified the insured that "the earned premium under this policy shall be calculated upon 140 per cent of the rates set forth in the schedule of this policy." The policy provides that rates may be modified, in the following language: "This Policy is issued by the Company and is accepted by this Employer with the agreement that the rates of premium are subject to modification as of the effective date of such modification in accordance with the rating plans then established by the California Inspection Rating Bureau and approved by the Insurance Commissioner of California, such modification, if any, to be expressed by endorsement attached to the Policy. It is further agreed that subject to the approval of the Insurance Commissioner the rates of premium are subject to change if during the term of this policy any amendment affecting the benefits provided by Workmen's Compensation Law become effective, such change, if any, to be expressed by an endorsement naming the effective date thereof."

[5] The trial court found that these endorsements were attached to the policies. This is all that is required, under the terms of the policy, to make effective any modifications in the rate of the premium. It therefore follows that rate increases under attack here were lawfully put into effect, and appellants were bound to pay any increase in the premium arising therefrom.

[6, 7] Finally, it is urged that the court erred in allowing interest upon the balance of the premium found due, from the *date of each policy*. "A liquidated claim, whether oral or written, carries with it as a matter of law interest from the time it was due, in the absence of any agreement to the contrary. And a claim may be said to be liquidated so as to bear interest when the amount due or to become due is fixed by law or by agreement between the parties." (Italics ours.) 33 Corp. Jur., p. 210. Under the policies here, the premium paid in advance was to be "applied on the final premium adjustment under the policy." As to the "deposit premium," to be paid upon the execution of the policy, there can be no question that it is a liquidated claim, and would bear interest if not so paid. As to any premium found due upon "final adjustment," it would appear that such demand is an unliquidated demand, and not interest bearing. "In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped." 33 Corp. Jur., p. 211. The premium, under a policy of this character, is subject to final adjustment at the end of the term. This adjustment is the matter of computing the amount actually paid to employees during the period covered, and also involves the matter of classification. The complaints here seek relief which is analogous to a discovery. Plaintiff alleges that it does not know whether any additional premium is due or not. It asks the court to examine into the matter and make a finding upon this issue. In our opinion, such a claim is clearly unliquidated. It is earnestly contended by respondent that the conduct of appellants in refusing, upon demand, an inspection of their books as provided in the policy alters the rule last stated. It is argued that if appellants had acquiesced in such demand, the additional premium would have been readily ascertained, and the claim would then have been a liquidated one. We cannot see the logic of this contention. Whether the additional premium was fixed through mutual consent or by action of the court is immaterial. The demand does not lose its unliquidated character through the failure of appellants to make an amicable adjustment. Appellants should not be penalized for insisting upon an adjudication of their rights in the premises. We therefore hold that the judgment was erroneous to the extent that it included such interest.

While the findings upon the essential and material facts will support a judgment in accordance with the views expressed herein, they contain many computations based upon the erroneous conclusions made by the trial court. It is therefore ordered that the judgments be reversed, with directions to the trial court to enter findings and judgments in accordance with this opinion. Neither party will recover its costs upon this appeal.

We concur: TYLER, P. J.; KNIGHT, J.



7 Cal.App.2d 676

CALLNOR v. CALLNOR et al.

Civ. 9809.

District Court of Appeal, First District,
Division 2, California.

June 19, 1935.

Rehearing Denied July 19, 1935.

Hearing Denied by Supreme Court
Aug. 16, 1935.

1. Judgment ⇨715(1)

Judgment is *res judicata* only in so far as it is within issues of cause in which it is rendered.

2. Divorce ⇨172

In action for divorce, parties may seek a determination of their property rights, but if they elect not to do so, such rights are not deemed adjudicated and are subject to determination in another proceeding.

3. Divorce ⇨255

Where property rights are put in issue in divorce proceeding, either by specific allegations describing such property, or by allegation that no community property existed, decree is *res judicata* of such rights.

4. Divorce ⇨255

In action for divorce, either party may join a third party who claims interest in community property, and decree declaring property rights is equally binding on parties to divorce and on party so joined.

5. Divorce ⇨255

Third party, joined in divorce action for purpose of determination of property rights, is required to defend only such interest in property as is put in issue by pleadings, and is not foreclosed from asserting any other interest in property which is not at issue.

6. Improvements ☞4(1)

Ordinarily, party is not entitled to reimbursement for improvements voluntarily made on land of another in absence of express contract requiring landowner to pay.

7. Improvements ☞1

Improvements made on land become part of realty and assume same character of property, separate or community, as the land.

8. Divorce ☞201

Jurisdiction of court in divorce proceeding over property rights is limited to property which belongs to community or which is separate property of spouses (Civ. Code, § 141 et seq.).

9. Divorce ☞201

Unless pleadings in divorce allege that third party claims interest in community property or holds separate property in fraud of one spouse, court is without jurisdiction to determine property rights of third party (Civ. Code, § 141 et seq.).

10. Judgment ☞255

Decree determining title to realty and dividing it between community and third party, rendered in divorce action wherein pleadings alleged that third party claimed ownership of property and that community claimed reimbursement for community funds gone into improvements, held not res judicata of suit to quiet title to property, since decree went beyond issues of divorce action (Civ. Code, § 141 et seq.).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Eugene W. Callnon against John W. Callnon and Harold J. Elliot, as guardian of the person and estate of John W. Callnon, an incompetent person. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Paul D. Morse and Frank O. Nebeker, both of Oakland, for appellants.

Busick & Busick, of Sacramento, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued to quiet title to three parcels of real property located in Redwood City, San Mateo county. The defendant is the son of the plaintiff and, having been declared an incompetent person, was defended by his guardian. Plaintiff had judgment.

The action was defended in the trial court upon the ground that the title to the property was adjudicated in a divorce proceeding conducted in Sacramento county and that is the only point raised on this appeal. The property was purchased by the plaintiff when the son was but five years of age, and, through evidence produced by the defendant herein, it was shown conclusively that all the improvements thereon were made and paid for by the plaintiff without any aid from the son. Since the original purchase of the land, the plaintiff has maintained complete and exclusive possession without any claim of ownership or interest by the defendant until the Sacramento decree was pleaded in this proceeding.

On December 18, 1928, the defendant herein, John W. Callnon, filed suit for divorce against his then wife, Eureka Callnon. On January 2, 1930, the wife filed an amended cross-complaint, from which it appears that the parties were married June 15, 1910. In this cross-complaint several separate parcels of real and personal property were described as the community property of the marriage and the plaintiff on this appeal, E. W. Callnon, was joined as a cross-defendant therein upon the allegation that he claimed the ownership of "three certain parcels of real property consisting of town lots and buildings thereon situated in Redwood City, San Mateo County, California, * * * said property now standing in the name of the said cross-defendant, E. W. Callnon." Paragraph VIII of this cross-complaint reads: "That all of the hereinabove mentioned property was acquired by the community funds of the defendant and cross-complainant and plaintiff and cross-defendant, John W. Callnon, save and except the property mentioned in sub-paragraphs VII-a, VII-c, and VII-d of Paragraph IV hereof * * * that as to the property mentioned in said sub-paragraph 7-d of said paragraph IV, the same consists of certain lots of land and buildings thereon, and that said lots stand in the name of said E. W. Callnon; that upon information and belief the buildings were constructed out of the community earnings of said Eureka Callnon and John W. Callnon with the understanding between said E. W. Callnon and John W. Callnon that the latter and Eureka Callnon should thereby be entitled to an equitable interest in said property to the extent of the value of said buildings."

On the trial of the divorce action the court found that the community owned an undivided one-half interest in the Redwood City property and awarded to the defendant herein, John W. Callnon, such undivided one-half interest as his separate property.

Briefly, the contentions of the parties on this appeal are: The appellant relies on the Sacramento decree as a final adjudication that he is the owner of an undivided one-half interest in this particular property. The respondent contends that the title and ownership of the property was not in issue in the Sacramento trial and that the decree in that case is not *res judicata* as to the title to this particular property. The trial court adopted the view of the respondent herein and our examination of the record satisfies us that all the equities herein support the judgment. An examination of the record of the divorce proceeding shows that the father and son were not adverse parties therein and that the son made no claim of title or right of ownership in this particular property. The evidence here further shows that the father enjoyed the peaceful and undisputed possession of the premises for a period of thirty-five or forty years, during which time he invested his savings from a small salary in the improvement and care of the property.

[1] Upon the question whether the decree of the Sacramento court is conclusive in this proceeding, the following general principles may be taken as settled rules of law in this jurisdiction. A judgment is *res judicata* only in so far as it is within the issues of the cause in which it is rendered. *Baar v. Smith*, 201 Cal. 87, 97, 102, 255 P. 827; *Tonningsen v. Odd Fellows' Cem. Ass'n.*, 60 Cal. App. 568, 572, 213 P. 710; *Brown v. Brown*, 170 Cal. 1, 6, 147 P. 1168; 15 R. C. L. 853.

[2] In an action for divorce the parties may seek a determination of their property rights; but, if they elect not to do so, such rights are not deemed adjudicated and are subject to determination in another proceeding. *Brown v. Brown*, 170 Cal. 1, 4, 147 P. 1168; *DeGodey v. Godey*, 39 Cal. 157, 163; *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 315, 260 P. 545; *Tarien v. Katz*, 216 Cal. 554, 558, 15 P. (2d) 493, 85 A. L. R. 334; *Taylor v. Taylor*, 192 Cal. 71, 75, 218 P. 756, 51 A. L. R. 1074.

[3] Where the property rights are put in issue in a divorce proceeding, either by specific allegations describing such property, or by allegation that no community property existed, the decree is *res judicata* of such rights. *Allen v. McCrary*, 220 Cal. 508, 510, 31 P. (2d) 388; *Brown v. Brown*, 170 Cal. 8, 147 P. 1168.

[4] In an action for divorce either party may join a third party who claims an interest in the community property and the decree declaring the property rights is equally binding on the parties to the divorce and on the party so joined. *Kashaw v. Kashaw*, 3 Cal. 312, 322; *Weyer v. Weyer*, 40 Cal. App. 765, 182 P. 776.

[5] But a third party joined for that purpose is required to defend only such interest in the property as is put in issue by the pleadings and is not foreclosed from asserting any other interest in property which is not at issue. This follows from the rule of *Baar v. Smith*, *supra*, and similar cases confining the application of the doctrine of *res judicata* to the issues raised in the former action.

[6, 7] Since the only issue raised in the Sacramento case in so far as the Redwood City property was concerned was the claim for reimbursement for alleged community funds advanced to the respondent herein, it remains to consider what jurisdiction that court had under that issue. Ordinarily, a party is not entitled to reimbursement for improvements voluntarily made on the land of another in the absence of an express contract requiring the landowner to pay. And it has been held uniformly that improvements made upon land become a part of the realty and assume the same character of property—separate or community—as the land. Thus, it has been held that when the husband uses community funds to improve the separate property of the wife the community interest in the funds is lost and the husband takes no interest in the land and has no claim for reimbursement. *Dunn v. Mullan*, 211 Cal. 583, 589, 296 P. 604, 77 A. L. R. 1015; *Shaw v. Bernal*, 163 Cal. 262, 267, 124 P. 1012; *Provost v. Provost*, 102 Cal. App. 775, 779, 283 P. 842. Similarly, when the husband uses community funds to improve his own separate property, all becomes the separate property of the husband—subject, however, to the wife's claim for reimbursement for her share of the community funds used. *Provost v. Provost*, *supra*;

Dunn v. Mullan, *supra*; Estate of Barreiro, 86 Cal. App. 764, 766, 261 P. 509.

[8-10] From the foregoing, and from the authorities which we will hereafter cite, it may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or which is the separate property of the spouses. This jurisdiction is found in section 141 et seq. of the Civil Code which authorizes the division of the community property and a lien upon the separate property of the husband in aid of the enforcement of remedial orders made in the proceeding. An exception to the general rule is found when it is alleged that separate property has been conveyed to a third party to defraud the marital rights of one of the spouses, but such a case is not presented here. Hence, unless the pleadings in divorce allege that a third party claims an interest in the community property or holds separate property in fraud of one of the spouses, the court is without jurisdiction in the divorce proceeding to determine the property rights of the third party. *Cummings v. Cummings*, 75 Cal. 434, 442, 17 P. 442; *Kashaw v. Kashaw*, 3 Cal. 312, 322; *Weyer v. Weyer*, 40 Cal. App. 765, 768, 182 P. 776; *Cal. Filter Co. v. Superior Court*, 97 Cal. App. 99, 104, 274 P. 1012. This is so because the action is not one for the recovery of either real or personal property, but one for divorce in which the court may "divide" the community property and, for that purpose, may first litigate the conflicting claims to the community property and order it returned to the community if found to have been fraudulently conveyed. But where, as here, the pleadings expressly allege that the third party "claims the ownership" of the property, fail to allege fraud or conspiracy, fail to allege any claim of ownership on the part of the community, and allege only a claim for reimbursement for community funds alleged to have gone into improvements upon the realty, the title and ownership of the property is not put in issue. Upon such pleadings in the divorce case the third party was called to defend the claim for reimbursement only, and that portion of the decree which assumed to determine the title and ownership of the realty and to divide it between the community and the third party was beyond the issues of that proceeding.

Appellant relies on the statement found in 15 California Jurisprudence, page 86, that the failure of a complaint to state a cause of action does not render the judgment thereon subject to collateral attack. But this is not such a case. Here the complaint affirmatively pleads that the cause of action upon which the judgment was given does not exist. It pleads a cause of action which would give the court jurisdiction to render some other judgment and at the same time would affirmatively withhold jurisdiction to render the judgment which is under attack.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



8 Cal.App.2d 101

CONFAR et al. v. WHELAN et al.

Civ. 1194.

District Court of Appeal, Fourth District,
California.

June 26, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Appeal and error ⇐78(3)

Orders sustaining demurrer to complaint, granting defendant's motion to strike passages of complaint, and denying motion for new trial of issues raised on demurrer, *held* not appealable, but only right of appeal was from the judgment dismissing the action (Code Civ. Proc. §§ 589, 656).

2. Appeal and error ⇐347(1)

Appeal not taken within 60 days from entry of judgment could not be considered, notwithstanding appeal was taken within 60 days from order denying motion for new trial, on ground that consideration of motion for new trial gave appellants additional 30 days within which to appeal from judgment and that a new trial may consist of a re-examination of questions of law as well as questions of fact, since a motion for new trial cannot extend time within which to appeal from judgment beyond 60 days from entry of judgment (Code Civ. Proc. §§ 589, 656, 939).

Appeal from Superior Court, San Diego County.

Action by Mary Confar and others against Thomas Whelan and others and the American Bonding Company. From a judgment, plaintiffs appeal. On motion by defendant Bonding Company to dismiss appeal.

Motion granted.

Clifford C. Pease, of San Diego, and John B. Molenaar, for appellants.

Joe Crider, Jr., A. F. Mack, Jr., and Arthur E. White, all of Los Angeles, for respondents.

HARDEN, Justice pro tem.

This is an action against the district attorney of San Diego county and others for damages alleged to have been sustained by plaintiffs by reason of the unlawful arrest and detention of the minor child of plaintiffs. The American Bonding Company, a corporation, is joined as a defendant upon allegations that it is surety upon an official bond given by the district attorney for the faithful performance of his duties as such officer.

The demurrer of said bonding company to the complaint was sustained without leave to amend on December 3, 1934. A motion by said company to strike passages of said complaint was presented on December 4, 1934, and a written order made and filed on December 18, 1934, granting said motion. Pursuant to the order sustaining the demurrer, judgment of dismissal of the action as against said company was entered December 5, 1934; notice whereof was given to plaintiffs' counsel December 16, 1934. Notice of intention to move for a "new trial" of the issues raised on the demurrer was given and filed December 21, 1934. A minute order denying said motion for new trial was entered February 11, 1935. Notice of appeal was filed by plaintiffs on March 4, 1935, from the order sustaining the demurrer, from the order granting the motion to strike, from the order denying the motion for "new trial," and from the judgment.

Said bonding company now moves to dismiss the appeal upon the ground that the appeal was not taken within sixty days from the date of entry of the judgment, as prescribed by section 939, Code of Civil Procedure. Said section also provides that, in cases where proceedings upon motion for a new trial are pending, the time for appeal from the judgment shall not expire un-

til thirty days after entry in the trial court of the order determining such motion.

[1,2] Appellants contend that the making and consideration of the motion for new trial operated to give them the additional thirty days within which to appeal from the judgment; and in support of their position rely upon *Quist v. Michael*, 153 Cal. 365, 95 P. 658, and *Quist v. Sandman*, 154 Cal. 748, 99 P. 204. Said decisions grow out of the same appeal. In said case the appeal was from the judgment and from an order denying a motion for a new trial. There the trial was upon an agreed statement of facts, with a stipulation waiving findings. The Supreme Court, refusing to dismiss the appeal from the order denying the motion for new trial, affirmed said order. This was done without a consideration of the merits of the appeal from the order. The judgment on appeal from said order proceeded upon the theory that, the trial court having actually passed upon the motion for new trial notwithstanding that the facts were established by the statement, the proper order on appeal was an affirmation of the order denying a new trial rather than a dismissal.

The essence of appellants' position is that a new trial may consist of a re-examination of questions of law as well as a re-examination of questions of fact. This is contrary to accepted conceptions of law and to the language of section 656 of the Code of Civil Procedure. The demurrer raised questions of law. Section 589, Code Civ. Proc.; *Brennan v. Ford*, 46 Cal. 7; *Philip v. Durkee*, 108 Cal. 300, 41 P. 407. The order sustaining the demurrer was not an appealable order, nor was the order granting the motion to strike. *Bryant v. Kelly*, 203 Cal. 721, 265 P. 817; *Wood, Curtis & Co. v. Missouri, etc., Ry. Co.*, 152 Cal. 344, 92 P. 868. Since the amendment of section 963, Code of Civil Procedure, in 1915, no appeal has been provided from an order denying a motion for a new trial. *Gray v. Cotton*, 174 Cal. 256, 162 P. 1019, *Kenney v. Kenney*, 220 Cal. 134, 30 P.(2d) 398. The only right of appeal which appellants had was an appeal from the judgment. The device of moving for a new trial, under the circumstances existing here, cannot extend the time within which to appeal from the judgment beyond sixty days from the entry of the judgment. The appeal not having been taken within that period, the court has no jurisdiction to consider the

appeal on the merits. Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am. St. Rep. 68; Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459; Kocher v. Fidelity & Deposit Co., 137 Cal. App. 474, 30 P.(2d) 535; Bley v. Board of Dental Examiners, 101 Cal. App. 666, 282 P. 19.

The motion to dismiss the appeal is granted.

We concur: BARNARD, P. J.; MARKS, J.



8 Cal.App.2d 100

BANK OF AMERICA v. SHISHMANIAN
et al.

Civ. 1362.

District Court of Appeal, Fourth District,
California.

June 26, 1935.

Appeal and error ⚡766

Appeal should be dismissed where appellant failed to file points and authorities within time or to request extension of time (Rules of the Supreme Court and District Courts of Appeal, rule I, § 4).



Appeal from Superior Court, San Diego County.

Action by the Bank of America against J. A. Shishmanian and others. From the judgment, defendant I. S. Chapman & Co. appeals.

Appeal dismissed.

Drumm, Tucker, Martell & Drumm, of Santa Ana, and James R. McBride, of San Francisco, for appellant.

Alfred Aram, of San Jose, for respondents Shishmanian.

Faber L. Johnston, of San Jose, for respondent Bank of America.

W. E. Johnson and C. H. White, both of San Francisco, for respondent Winklemen.

Farnsworth, Burke & Maddox, of Visalia, for respondent McKee.

HARDEN, Justice pro tem.

The transcript on appeal was filed July 31, 1934. No points and authorities have been filed by appellant; nor has any request for an extension of time within which to file same been presented. Regular notice of motion to dismiss the appeal was given, and no appearance made by appellant upon its presentation. It is stated by respondent in the notice of motion to dismiss that the questions attempted to be raised on appeal have become moot by reason of the finding of the trial court upon a trial on the merits that the appellant had no interest in the case. This representation is not denied.

For failure of appellant to file its points and authorities within the time prescribed by rule I, section 4, Rules for the Supreme Court and District Courts of Appeal, it is ordered that the appeal be dismissed. Salvador v. York, 137 Cal. App. 319, 30 P.(2d) 533.

We concur: BARNARD, P. J.; MARKS, J.



7 Cal.App.2d 711

BLACK v. BRINGHURST et al.

Civ. 10054.

District Court of Appeal, Second District,
Division 2, California.

June 21, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.

1. Principal and agent ⚡23(4)

Evidence of contract between landowners and agent giving agent option to purchase and exclusive right to sell certain property, of showing property to prospective buyer, and of bank statements of money received by landowners from agent's operations, held sufficient to show existence of principal and agent relationship between landowners and agent as respects liability of landowners for agent's fraud.

2. Action ⚡50(6)

Injured party may sue several joint tortfeasors in one action, or may maintain separate actions against each.

3. Judgment ⚡891

Payment of a judgment will discharge any other judgment which has been recovered.

ed for same injury, since only one compensation may be secured for one injury.

4. Judgment ⇨584

Unsatisfied judgment recovered against agents in action for fraud in sale of real property *held* not to bar action against their principals, who participated in the same fraud.

5. Fraud ⇨57

Letters of credit issued by agent to purchaser of property, setting forth amounts she had paid on property, *held* admissible in action for fraud against principals, to show amounts paid on her contracts which she had surrendered when the letters of credit were issued.

6. Fraud ⇨58(1)

Evidence in action for fraud in sale of real property, which showed unconscionable design to entice elderly widow with no business experience into buying property until her funds were exhausted, *held* to sustain award of actual and punitive damages.

Appeal from Superior Court, Los Angeles County.

Action by Josephine E. Black against E. W. Bringhurst and others. Judgment for plaintiff, and defendants Bringhurst and Clanton appeal.

Affirmed.

Walter F. Haas, H. C. Johnston, and Gerald E. Kerrin, all of Los Angeles, for appellants.

Edwin J. Miller, of Los Angeles, for respondent.

WILSON, Justice pro tem.

This is an appeal from a judgment for damages for fraud in the sale of real property to respondent. The action was brought against Bringhurst and Clanton, the appellants, and Gagnon, Duclos, Evans, and Hamilton. Judgment went against all except Evans and Hamilton, who were not served with process. Gagnon and Duclos have not appeared.

Because of appellants' argument that the evidence is insufficient to sustain the judgment against them—that the evidence does not connect them with the fraud—that the facts will be stated with more particularity than would otherwise be necessary. At some time prior to the transactions complained of here the respondent purchased

a contract for the sale of a lot in Van Nuys from a man who had bought the same through Gagnon, one of the defendants here. She continued to make payments on the contract at Gagnon's office for about a year. Upon the occasion of one of the payments she was followed from Gagnon's office by Evans, who endeavored to persuade her to purchase additional property from Gagnon, representing that he could make her a large profit within a short time. Later Evans and Hamilton went to her home and after making further inducements to her persuaded her to go to Gagnon's office, where Duclos, who was Gagnon's office manager, concurred in all that Evans and Hamilton had said to her. As a result, she was prevailed upon to purchase other property at Van Nuys from Gagnon.

[1] The appellants, Bringhurst and Clanton, who owned adjoining tracts of acreage near Artesia, each subdivided his property into small building lots. After an unsuccessful selling campaign, they entered into a contract with Gagnon, giving the latter an option to purchase and the exclusive right to sell the property and agreeing to issue contracts to Gagnon, or his assignees, for lots purchased or sold by him, upon receiving a small cash payment. Subsequently to the respondent's last purchase of Van Nuys property Evans and Hamilton took her to see the Artesia property. There they all engaged in a conversation with Bringhurst, who at first stated that all of the tract was sold, but later referred to four lots that might be obtained. These are a part of the property which respondent purchased. While Bringhurst and Clanton severally owned their respective subdivisions, Clanton allowed Bringhurst, effectively, if not factually, to look after the sales in both tracts, to obtain bank statements of money received from Gagnon's operations, and generally to attend to the business of both. These and many other facts and circumstances appearing in the record are sufficient to connect the appellants with Gagnon as principals and agent, and the connection between Gagnon, Duclos, Evans, and Hamilton is beyond question. Additionally Bringhurst brought an action against Gagnon for an accounting of sales made by the latter under the contract between them and obtained a judgment for \$3,000 and

for cancellation of the contract. The evidence to a great extent is uncontradicted, and though conflicting as to some matters, fully sustains the foregoing facts. Gagnon unquestionably was the agent of appellants, Duclos was Gagnon's office manager, Evans' statements to the respondent were confirmed by Duclos, and Evans and Hamilton operated jointly. Bringhurst's statements made to respondent while they were on the subdivision aided materially in her deception. It is not necessary to recount the fraudulent statements made to respondent. It is sufficient to say that the fraud was gross, and that the representations made were known by all parties, excepting the respondent, to be false.

[2-4] Previously to the commencement of this action the respondent had sued Gagnon, Duclos, Evans, and Hamilton for the same fraud. During the trial of that action the contracts between Gagnon and these appellants were introduced in evidence, from which respondent obtained her first knowledge that Bringhurst and Clanton were the owners of the property, and that Gagnon was their agent. She proceeded with the trial of that action and obtained a judgment against Gagnon and Duclos, service of process not having been made upon Evans and Hamilton. That judgment remains unsatisfied. Although the respondent elected to take judgment against Gagnon and Duclos after having knowledge of the liability of appellants, she is not precluded from maintaining the present action, and the judgment in the former action is not a bar to the judgment here. Where there are several joint tort-feasors, the injured party may sue all in one action or may maintain separate and successive actions against those who joined in the commission of the injury. *Butler v. Ashworth*, 110 Cal. 614, 43 P. 4, 386; *Grundel v. Union Iron Works*, 127 Cal. 438, 59 P. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75. He may not secure more than one compensation for one injury, and if he has obtained two or more judgments in separate actions against different joint tort-feasors, the payment of one judgment will operate as a discharge of the other. *Butler v. Ashworth*, *supra*. The respondent's unsatisfied prior judgment against Gagnon and Duclos is not a bar to this action against Bringhurst and Clanton.

By the contracts between appellants and Gagnon the latter was granted an option to purchase and the exclusive right to sell appellants' subdivisions. Gagnon issued contracts to Evans and he assigned the same to respondent. Appellants argue that this arrangement effectively removes them from liability for the fraud perpetrated upon respondent. From the entire record it seems clear that this was a part of an arrangement whereby it was sought to remove the sellers (appellants) as far as possible from the buyers, to make Gagnon solely responsible, and to relieve the appellants of any untoward, but apparently not unexpected, consequence of the scheme to dispose of almost worthless property which they themselves had been unable to sell.

[5] More than two years after the sale of the property to respondent, when she had been pressing Gagnon to fulfill the promises made to her, Gagnon took up the contracts and issued so-called letters of credit to her setting forth the amounts she had paid on the several lots. Appellants assign as error the admission in evidence of these letters of credit. If for no other purpose, they were admissible to show the amounts paid by respondent on the contracts, as she had surrendered her contracts when the letters of credit were issued, and was unable to state the exact amounts paid by her. Other assignments of error in the admission of evidence, as well as questions relating to authority of the agent, and ratification of his acts, are disposed of by our conclusion as to the connection of all of the parties in the fraud.

[6] The evidence sustains the verdict for actual damages. The award of punitive damages is justified by the record, and the same are not excessive. It is neither possible nor necessary to recite the evidence contained in the voluminous record. The evidence shows an unconscionable design to entice the respondent, who was an elderly widow with no business experience, into buying property until her funds were exhausted.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.

7 Cal.App.2d 275

RAY et al. v. CALIFORNIA HOME BLDG.**LOAN CO. et al.**

Civ. 9890.

District Court of Appeal, First District,
Division 1, California.

May 31, 1935.

Mandamus ⇨3(9)

Ordinarily, mandamus will not lie to compel transfer of corporate stock; suit in equity being proper remedy, if adequate.

Original proceeding by Martin E. Ray and others for a writ of mandamus to the California Home Building Loan Company and others.

Petition denied.

Ellis, Lyman & Steindorf, of San Francisco, for petitioners.

PER CURIAM.

Ordinarily mandamus will not lie to compel a transfer of corporate stock; a suit in equity is the proper remedy. There is nothing contained in the petition to show that this remedy is inadequate. *Spangenberg v. Western Heavy Hardware & Iron Co.*, 166 Cal. 284, 135 P. 1127.

The petition is denied.



7 Cal.App.2d 698

LAFFERTY v. MARKET ST. RY. CO. et al.

(two cases).

Civ. 9446.

District Court of Appeal, First District,
Division 1, California.

June 21, 1935.

Rehearing Denied July 20, 1935.**Hearing Denied by Supreme Court**

Aug. 19, 1935.

1. Appeal and error ⇨1002**Carriers** ⇨320(4)

In actions for injuries sustained by intending passenger and infant child when street car conductor, about to alight so as to go forward to flag street car over railroad crossing, collided with such passenger, conflicting versions of manner of accident *held* for jury, and jury's acceptance of intending

passenger's version as true could not be disturbed on appeal.

2. Damages ⇨130(1)

\$3,000 verdict for woman who suffered severe spraining of back, with torn ligaments and contusions on hips, shoulders, and back, and was confined to bed for about 2½ months, and whose back was strapped for 1 month, and who suffered pain even 2 years after accident when doing heavy housework, *held* not excessive.

3. Damages ⇨130(1)

\$5,000 verdict for infant child who suffered lineal fracture in parietal bone extending down into petrous portion of temporal bone, and who was restless, slept poorly, vomited frequently and had headaches as result of accident, *held* not excessive.

4. Trial ⇨133(6)

In actions for injuries to mother and child, any errors in physician's testimony referring to plaintiffs' poverty and to possibility of epilepsy developing from child's head injury, and allegedly inflammatory argument based on fact that defendant's street car conductor gave only company number when requested to give his name after accident, *held* cured by court's timely action, at defendants' request, in striking out such testimony and argument and admonishing jury to disregard them, and alleged errors were not prejudicial under record.

5. Appeal and error ⇨1015(5)

New trial ⇨144

In actions for injuries to mother and child, where defendants' affidavit that plaintiff mother, as jury was retiring to deliberate, changed seat to position where jurors passed within two or three feet of her, bowed her head against baby's head and moaned audibly in indication of grief, was denied by mother's counter affidavit, action of trial court on conflicting affidavits was conclusive, and denial of new trial was not error.

6. New trial ⇨140(3)

That, when jurors were asked collectively by court if any had ever presented claim against defendant street railroad company one juror made no response, and that attorney first learned after verdicts that such juror had presented a claim against the company, *held* not to entitle defendant company and conductor to new trial, there being no showing that company did not know of juror's claim.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by James Francis Lafferty, a minor, by James Lafferty, his guardian ad litem, and action by Nellie Lafferty, against the Market Street Railway Company, Joseph Bedford, and another. From judgments for plaintiffs, named defendants appeal.

Affirmed.

William M. Cannon, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Peter J. Mullins, Patrick J. Murphy, and Alexander S. Keenan, Jr., all of San Francisco, for respondents.

GRAY, Justice pro tem.

The above-entitled actions, having arisen out of the same accident, were consolidated for trial. The jury returned verdicts, awarding Nellie Lafferty \$3,000 and James Francis Lafferty, her minor son, \$5,000 as damages against Market Street Railway Company and Joseph Bedford, its conductor, and thereupon judgments were entered accordingly. Their motions for new trials having been denied, the latter appeal from such judgments.

The Market Street Railway Company maintains and operates a double track street railway, running in a general northerly and southerly direction, on Guerrero street in San Francisco. Steam railroad tracks of the Southern Pacific Company, extending in a general northeasterly and southwesterly direction, intersect the street railway tracks immediately north of Twenty-Sixth street. Northbound street cars cross Twenty-Sixth street and stop with their rear ends clear of that street and in a position where each conductor may go forward to flag his street car over the railroad crossing. At the time of the accident, Nellie Lafferty, carrying in her left arm James Francis Lafferty, aged one and a half years, was waiting at this stop to board a northbound street car. While so waiting, she and Joseph Bedford, the conductor of such street car, collided and she and her baby were thereby knocked to the pavement with resultant injuries.

[1] The testimony as to the manner and cause of such collision is sharply conflicting. Mrs. Lafferty testified that while she was standing still, clear of the approaching street car, Bedford, in alighting from the moving street car, swung out from its platform against her stomach, knocked her baby and herself to the ground, and fell

on top of them. Bedford testified that when the street car was approaching within a foot of its regular stop he was standing on its step, turning to his left preparatory to alighting, when the street car stopped; that at the instant he turned towards the front of the car, Mrs. Lafferty stepped towards the car in preparation of boarding it when it stopped, and that she came in contact with his left side, thereby precipitating herself and baby to the ground. The motorman of a following street car described the actions of Mrs. Lafferty and Bedford substantially as the latter did. Appellants contend their version of the accident is alone worthy of belief, and since, accordingly, its sole cause was Mrs. Lafferty's negligence in stepping forward against Bedford standing on the step, the judgment must be reversed.

In support of the first premise, they argue that her description of Bedford's movement is purely her conclusion and not her observation. To establish this, they point to her admission, on cross-examination, that she did not see his position on the street car before he swung out and did not see him until he hit her, and suggest that her inability to see was due to the obstruction of her vision by the baby, carried in her left arm. The distance traveled by Bedford in swinging from the moving car against Mrs. Lafferty's body was so short that its beginning and end were practically simultaneous. It is not surprising, therefore, that she could not fix his position on the street car as it moved towards her, but it does not follow that, because she did not see him at the start of his movement, she could not have seen him at its end. Nor can it be said that the baby's body must have obscured her view in absence of evidence accurately fixing the relative positions of her eyes, his body, and the approaching street car. The jury in the first instance, and the trial judge on the motions for new trials, were entitled to accept either version, and their acceptance of Mrs. Lafferty's version as true cannot be here disturbed.

[2,3] In support of their claim that the verdicts are excessive, appellants rely upon the testimony of two doctors regularly employed by the company. The first examined respondents 4 months and the other 21 months after the accident. Each, basing his opinion on his examination, testified that then Mrs. Lafferty showed no evidence of injury, and James Francis Lafferty ap-

peared to be an average normal, healthy child. Her attending physician diagnosed Mrs. Lafferty's injuries as a very severe spraining of her back, with torn ligaments and with contusions on her hips, shoulders, and back. She testified that she was confined to her bed for about 2½ months; that her back was strapped for 1 month and that she suffered pain, and still, two years after the accident, suffers pain when she does heavy housework.

An X-ray of the baby's skull, taken about a month after the accident, disclosed on the right side a lineal fracture in the parietal bone extending down into the petrous portion of the temporal bone. The same attending physician testified that while the baby was under his observation for 3 months, he was restless, slept poorly, vomited frequently, and had headaches. His mother testified to a continuation, in a modified form, of these symptoms up to the time of trial.

In sustaining a larger verdict for injuries similar to those sustained by the mother, this court, in *Kleem v. Chapot*, 112 Cal. App. 553, 556, 297 P. 574, 575, stated the rule here applicable, as follows: "Nor do we think, considering the nature of plaintiff's alleged injuries, that the verdict is excessive. If such injuries were the result of the accident, as the jury determined they were, the verdict is certainly not excessive. The question of excessive damages is one which is first addressed to the trial court, and appellate courts can interfere only when the damages are so exorbitant as to suggest, at first blush, passion, prejudice or corruption on the part of the jury." In *Lagomarsino v. Market Street Ry. Co.*, 202 Cal. 474, 261 P. 465, the Supreme Court refused to say that an award equal to that given the baby for a similar head injury, with similar symptoms, suffered by an adult, was excessive.

[4] Appellants assign numerous errors, but their lack of novelty or importance does not warrant extended discussion. They claim that the voluntary statement of respondents' doctor, in his description of his treatments of Mrs. Lafferty's injuries, that "I had to get somebody to nurse them because they were very poor people" erroneously presented respondents' poverty to the sympathy of the jury. They also contend that the same doctor's reference to the possibility of Jacksonian epilepsy resulting

from the baby's head injury invited the jury to award speculative damages. They further assert that the argument to the jury, based upon the fact that Bedford gave his company number when Mrs. Lafferty requested his name after the accident, was inflammatory. There is merit in respondents' argument that, under the record, such matters did not constitute error. However, the errors, if any, were cured by the court's timely action, at appellants' request, in striking out such testimony and argument and admonishing the jury to disregard the same. No prejudice was suffered, since the record does not show that the question of negligence was close, or that the verdicts were excessive, or that there was a deliberate and repeated effort to present improper matters to the jury.

[5,6] Lastly, appellants claim that the trial court erred in denying their motions for new trials because of Mrs. Lafferty's misconduct and the untruthful answer of a juror on her *voir dire*. According to an affidavit filed by appellants, Mrs. Lafferty, as the jury was retiring to deliberate on its verdicts, changed her seat to a position where the jurors passed within two or three feet of her, bowed her head against her baby's head and moaned audibly in indication of grief. Mrs. Lafferty, in a counter affidavit, denied such action. The action of the trial court upon these conflicting affidavits is conclusive. *Chappell v. San Diego, etc., Ry. Co.*, 201 Cal. 560, 258 P. 73; *Patterson v. Keeney*, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232. From the affidavit of appellants' trial attorney, it appears that when the jurors were asked collectively by the court if any had ever presented a claim against the company, one juror made no response; that affiant, assuming her answer to be negative, accepted her and that, since the return of the verdicts, he first learned that this juror had presented a claim against the company in 1924. There is no showing that the Market Street Railway Company did not know of the presentation of such claim by the juror, and therefore it would have been reversible error for the court to have granted a new trial upon this ground. *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 P. 92.

The judgments are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

7 Cal.App.2d 650

FORRESTER v. SPITZER et al.

Civ. 10107.

District Court of Appeal, Second District,
Division 1, California.

June 18, 1935.

1. Exceptions, bill of $\S$ 43(1)

Order denying motion for relief from default in the matter of bill of exceptions held not abuse of discretion (Code Civ. Proc. $\S$ 953b).

2. Appeal and error $\S$ 554(3)

In absence of bill of exceptions, order granting new trial on the ground of insufficiency of the evidence must be affirmed.

3. Appeal and error $\S$ 790(2)

Appeal from judgment must be dismissed where order granting motion for new trial was affirmed.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by L. P. Forrester against Anna Spitzer and another. From an order granting plaintiff's motion for a new trial, from a judgment for plaintiff and from an order denying relief from default in the matter of proposed bill of exceptions, defendants appeal. On respondent's motion to dismiss the appeals.

Order granting motion for new trial affirmed, appeal from judgment dismissed, and order denying relief from default affirmed.

L. G. Shelton, of Los Angeles, for appellants.

Dailey S. Stafford, of Los Angeles, Grant Chapman, of Covina, and Charles W. Cradick, of Los Angeles, for respondent.

CONREY, Presiding Justice.

This case comes before the court upon a motion of respondent to dismiss the appeals. The motion is upon several grounds of which one is, that the appeals are frivolous and taken only for delay.

The only transcript on file is the clerk's transcript filed November 10, 1934. When the motion came on for hearing, appellants asked leave to file their opening brief. We have allowed that brief to be filed as of that date, March 7, 1935, and will consider it as part of appellants' opposition to the motion.

The judgment is based entirely upon findings in relation to paragraph 2 of the third cause of action of the plaintiff's complaint. That cause of action as pleaded was an account stated in the sum of \$5,175.-02. The court found that at the time stated in the complaint there was an account stated between the parties, but that the amount thereof was \$682.44. Judgment was entered accordingly. The plaintiff being dissatisfied with this judgment presented his motion for a new trial. The judgment was rendered by Judge Desmond. When the motion for new trial came on for hearing, the trial judge was no longer a judge of that court and therefore the motion had to be presented to another judge. After due hearing before Judge Minor Moore, the motion for new trial was granted "upon the ground of the insufficiency of the evidence." Notice of this order was served on counsel for defendant on May 12, 1934. The defendants failed to prepare their bill of exceptions within the time allowed by law. On June 15, 1934, after due notice, the defendants presented to the court a motion under section 473 of the Code of Civil Procedure, for relief on the ground of excusable neglect, from their default in the matter of filing their proposed bill of exceptions on appeal from order granting new trial. This motion was denied.

The defendants filed notices of appeal as follows: On May 17, 1934, appeal from the order granting plaintiff's motion for a new trial; on May 24, 1934, appeal from the judgment; on June 19, 1934, appeal from the order denying relief from default in the matter of the proposed bill of exceptions. From the clerk's supplemental transcript, it appears that appellants first requested the clerk to prepare for them reporter's transcripts, but did not comply with the statutory requirements (section 953b, Code Civ. Proc.) necessary to entitle them to those transcripts.

[1-3] An examination of the affidavits on the motion for relief from default in the matter of the bill of exceptions shows that they are not sufficient to establish an abuse of the discretion of the court in denying the motion. This leaves the appeal from the order granting the motion for new trial unsupported by any record from which it could be determined that the court erred in granting that motion. Since for these reasons the order granting motion

for new trial must be affirmed, it follows that by virtue of that order the judgment has been set aside and there is no longer any reason for considering the appeal therefrom.

The order denying relief from default is affirmed; the order granting motion for new trial is affirmed; and the appeal from the judgment is dismissed.

We concur: HOUSER, J.; YORK, J.



7 Cal.App.2d 733

PNEUCRETE CORPORATION v. UNITED STATES FIDELITY & GUARANTY

CO. et al.

Civ. 9085.

District Court of Appeal, Second District,
Division 1, California.

June 22, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.

1. States ☞108½

Purpose of provision of Public Works Act requiring bond to be furnished by contractor was to give to materialmen and laborers on public works additional means of receiving compensation (St. 1919, p. 487, as amended).

2. States ☞108½

Materialman seeking to recover rental of equipment furnished to public works contractor was not compelled to submit claim to arbitration as required by contract of hire before bringing action on contractor's statutory bond, since any attempt to limit materialman's remedy under bond would be against public policy (St. 1919, p. 487, as amended).

3. Contracts ☞292½

Clause for arbitration in contract is not self-executory, but must be enforced by party seeking arbitration (Code Civ. Proc. § 1282).

4. Contracts ☞292½

Contractor and surety sued for rental of equipment waived right to compel arbitration as provided for in contract of hire, where they filed answer and amended answers in action, and failed to request arbitration until within 24 hours of date of trial (Code Civ. Proc. § 1282).

5. Contracts ☞333(5)

Contract may be pleaded in its legal effect and need not be set forth in *hæc verba*.

6. States ☞108½

Amended complaint on public works contractor's bond for rental of equipment furnished to contractor, alleging that plaintiff furnished materials to contractor and that contractor used them, promised to pay therefor agreed price, and that money became due and was not paid, sufficiently alleged cause of action on express contract (St. 1919, p. 487, as amended).

7. Pleading ☞403(3)

Ambiguity or uncertainty caused by plaintiff's alleged failure to plead contract in *hæc verba* was cured by filing of amended answer setting forth contract in *hæc verba*.

8. Appeal and error ☞1039(2)

In action on public works contractor's bond for rental of equipment furnished to contractor, plaintiff's alleged failure to properly allege contract of hire would not be prejudicial, where action was tried on theory that plaintiff was proceeding on express contract (St. 1919, p. 487, as amended).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Pneucrete Corporation against the United States Fidelity & Guaranty Company and other. From a judgment for plaintiff, defendants appeal.

Affirmed.

Henry E. Phister, of Los Angeles, for appellants.

Charles R. Nelson, of Los Angeles, for respondent.

ROTH, Justice pro tem.

On November 12, 1929, J. D. Harms, one of the appellants, as contractor, entered into a contract with Los Angeles County Flood Control District for certain mechanical work, to wit, "Guniting of levees in San Gabriel Wash." Pursuant to the Public Works Act, Statutes of 1919, p. 487, as amended to and including May 10, 1929, Harms, as principal, and appellant United States Fidelity & Guaranty Company, as surety, executed and delivered to the district a "Bond for Materialmen and Laborers," dated November 2, 1929, whereupon appellant Harms, as contractor, entered upon the performance of and completed said contract. During the

course of the work under said contract, respondent Pneucrete Corporation contracted to and did furnish to Harms certain equipment and machinery to be used and which was actually used in and upon said public works. Harms agreed to pay therefor certain sums of money as provided in the contract with respondent for the rental thereof, which contract contained the following clause: "In case of controversy, both parties agree to arbitrate the issue in accordance with the rules of the American Arbitration Association."

On January 27, 1930, respondent filed this action against appellants, as principal and surety upon the "Materialmen's Bond," alleging the execution of the contract for the public improvement, the giving of the "Materialmen's Bond," the contract for the hiring of equipment by Harms from respondent materialman, alleging with reference to the "Materialmen's Bond," "that plaintiff relies particularly upon said written instrument." Thereafter, on February 24, 1930, appellants answered said complaint, which answer in addition to denying generally the material facts denied the execution of the contract executed between respondent and Harms. On the same day appellants filed their answer to the complaint, a demurrer which had been theretofore filed by appellants to the complaint was sustained. Thereafter, an amended complaint, practically identical to the original complaint save that it pleaded the contract for the hiring of the equipment by defendant Harms in its legal effect rather than in *hæc verba*, was filed, to which amended complaint defendants filed their verified answer on March 17, 1930, denying the contract between respondent and Harms, but admitting the execution of the "Materialmen's Bond" and admitting also that respondent relied thereon.

Twenty-two months thereafter the case was called for trial, at which time the question of arbitration was first raised by appellants. Until the day of trial appellants had not filed any petition pursuant to section 1282 of the Code of Civil Procedure for an order directing that arbitration proceed, made any motion or taken any other means to stay the action, or in any manner raised the issue of arbitration by answer filed to the original or to the amended complaint. On January 27, 1932, which was the day before the date upon which the case had been set for trial, appellants served upon respondent a "Notice of Mo-

tion to Stay Action," which was supported by the affidavit of Harms, in which affidavit Harms referred to the contract he had made with respondent and specifically to the arbitration clause therein, averring further that Harms had requested respondent to proceed with arbitration in the manner provided for in the contract and that respondent had refused to go ahead with said arbitration. The affidavit does not state when the demand for arbitration was made nor when plaintiff refused to arbitrate prior to the date of the affidavit. A reply affidavit was made and filed by the attorney for respondent, which affidavit denied a refusal to arbitrate, but admitted a refusal to arbitrate on that date, which was the date of trial. This affidavit also averred that the action was on the bond; that the appellants had failed to petition for arbitration; and that appellants had in effect waived arbitration because of their default in making any attempt to proceed therewith. The motion to stay action was denied, whereupon appellants requested and were granted permission to file an amended answer, which amended answer set forth the contract between Harms and respondent which had previously been denied by two several answers filed by said appellants, one to the original and one to the amended complaint, and no allegations are made in said amended answer as to the desire, willingness, readiness, or ability of said appellants to arbitrate. Judgment went for the respondent, and from that judgment appellants appeal.

[1,2] Conceding that the arbitration clause in the contract between respondent and Harms was mandatory upon those parties, under the facts and circumstances here outlined the decisive question on this appeal is whether that contract became a part of the bond executed by appellants pursuant to the Public Works Act, Statutes of 1919, p. 487, as amended.

The purpose of the bond provision of the Public Works Act, we believe, was to give to materialmen and laborers who furnish material for and render services upon public works an additional means of receiving compensation. This rule has been consistently recognized with reference to private works. 17 Cal. Jur. 15, 16; Peterson v. Freiermuth, 17 Cal. App. 609, 121 P. 299; Avery v. Clark, 87 Cal. 619, 25 P. 919; 22 Am. St. Rep. 272; Birch & Co. v. Magic Transit Co., 139 Cal. 496, 73 P. 238; Humboldt Lumber Mill Co. v. Crisp, 146

Cal. 686, 81 P. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811. No lien being available to those who perform labor or furnish material on public works (*Cooley v. Freeman*, 204 Cal. 59, 266 P. 545), the provisions of the Public Works Act requiring a bond were obviously enacted to create a fund in lieu of the building or work itself against which materialmen and laborers might proceed as an additional and contemporaneous remedy. The bond required is not a voluntary bond but a statutory bond (*Williamson v. Egan*, 209 Cal. 343, 344, 287 P. 503; *Continental National Bank v. Republic Casualty Co.*, 202 Cal. 586, 589, 262 P. 300), and affords an additional or cumulative remedy (*Sunset Lumber Co. v. Smith*, 95 Cal. App. 307, 272 P. 1068). As a result of the legislation mentioned there is now given to materialmen and laborers who furnish material or render services on public works an added and new security. *Globe Indemnity Co. v. Hanify*, 217 Cal. 721, 730, 20 P.(2d) 689; *United States, to Use of Standard Oil Co., v. City Trust, etc., Co.*, 21 App. D. C. 369; *Fidelity & Deposit Co. v. United States, etc.*, 20 App. D. C. 376, affirmed 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194; *City of St. Louis v. Hill-O'Meara Construction Co.*, 175 Mo. App. 555, 158 S. W. 98; *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 P. 337; *Griffith v. Stucker*, 91 Kan. 47, 136 P. 937; *Donaldson & Yahn v. Benight*, 105 Okl. 108, 232 P. 116.

In *Globe Indemnity Co. v. Hanify*, supra, 217 Cal. 721, at page 730, 20 P.(2d) 689, 692, the court says: "The Public Works Act was first passed in 1919, and was designed as an aid to mechanics and materialmen in the enforcement of their lien rights. Its special effort was to make the General Mechanics' Lien Law more expansive and adaptable to actions in which the state, irrigation and reclamation districts and other large public corporations were the builders. That it is a part of the Mechanics' Lien Law of the state is made evident by the numerous references it makes to said law, and by the adoption of its provisions by reference. Both laws deal with the same specific subject, and are to be construed together. The Legislature did not intend to defeat or embarrass the right of a lien claimant by the remedies prescribed, but meant to broaden his remedy. Two remedies pointing to the same result being open to the claimant, he may pursue either as his interest will be best served.

A provision inserted in the bond by the surety, as here, in an attempt to limit the remedy a mechanic or materialman may choose to elect, would be ineffectual as an invasion of his statutory rights to adopt the remedy provided by law in a proceeding in which liberality of construction is favored."

It has been held that the statutory materialman's bond referred to in the above excerpt as being similar to the bond here in question creates a direct obligation, and that the bond itself affords a right of action against the principal and the surety. *General Electric Co. v. American Bonding Co.*, 180 Cal. 675, 679, 182 P. 444; *Purington v. Olsten*, 45 Cal. App. 621, 188 P. 288. The action upon the statutory bond is not in any sense based upon the personal liability of the contractor, but is based upon the obligation of the bond, since the bond provides a separate and distinct and statutory remedy. The obligation of the bond, therefore, is enforceable without reference to any contract between the contractor and the materialman. *Cooley v. Freeman*, 204 Cal. 59, 266 P. 545; *Hub Hardware Co. v. Aetna, etc., Co.*, 178 Cal. 264, 266, 267, 173 P. 81; *Los Angeles Stone Co. v. National Surety Co.*, 178 Cal. 247, 251, 173 P. 79; *Williams v. Tingey*, 26 Cal. App. 574, 147 P. 584; *Holden v. Mensinger*, 175 Cal. 300, 303, 304, 165 P. 950; *Hazard, Gould & Co. v. Rosenberg*, 177 Cal. 295, 297, 170 P. 612; *Wood v. Oakland, etc., Transit Co.*, 107 Cal. 500, 502, 40 P. 806; *Martin v. Becker*, 169 Cal. 301, 306, 146 P. 665, Ann. Cas. 1916D, 171.

In *Cooley v. Freeman*, supra, 204 Cal. 59, at pages 61 et seq., 266 P. 545, 546, the court says in speaking of an analogous situation:

"The test of the liability of appellant surety hereunder is not what the rights of the contractor and highway commission are under the construction contract, but is: Did respondent furnish material and perform labor which was utilized in the construction work covered by the contract for public work between the highway commission and the contractor, which said work was the subject of the indemnity agreement made by appellant and sued upon herein? There is no contention concerning the affirmative answer made by the court to this inquiry. The fact also is that the work of respondent was accepted.

"The liability of the surety is controlled by the provisions of the Public Work Stat-

utes of 1919, c. 303 (St. 1919, p. 487), as it read in 1924, the date of the contract herein. Said statute providing for the indemnity bond thereunder read in part as follows: " * * * And must provide that if the contractor, person, company, or corporation, or his or its subcontractor, fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the surety or sureties will pay the same in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon such bond, a reasonable attorney's fee, to be fixed by the court." * * *

"There is, therefore, no escape from the conclusion that this obligation is in nowise affected by the terms of the contract between the highway commission and the original contractor, nor by a question of whether the contractor has breached his contract with the state. The obligation of the surety is to supply to persons in the class of respondent a quick, reliable, and sufficient means of payment. No lien law is available to persons performing labor or furnishing materials which go into the construction of public works."

To hold that arbitration could be compelled as between respondent and appellant Harms could easily have the effect of nullifying the bond, as is said in *Sunset Lumber Co. v. Smith*, 95 Cal. App. 307, 272 P. 1068, 1071, with reference to materialmen's bonds required under sections 1184 et seq. of the Code of Civil Procedure, at page 313: "The act of 1919 does not require that plaintiff first proceed under section 1184 et seq. The period within which suit may be commenced on the bond as provided in the act of 1919 shows that there need be no steps taken under section 1184 or any waiting for a pro rata payment. The act of 1919 requiring that action on the bond be commenced within 90 days following the period within which claims of lien must be filed for record, it is obvious that, if a materialman was first required to bring an action under section 1184a, a period of time would not only possibly, but probably, expire in excess of 90 days from the time when claims of lien must be filed for record, and hence the bondsmen would, by insisting upon the plaintiff first exhausting his rights pursuant to section 1184 et seq., avoid liability for any portion of a mate-

rialman's claim. Such construction would defeat the purpose of the act."

The requirement of a bond in this case is a matter of public concern, and any attempt to limit, nullify, or render ineffectual the bond or any of its terms would be against public policy. *Cooley v. Freeman*, supra; *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.(2d) 745; *Globe Indemnity Co. v. Hanify*, supra; *Globe Indemnity Co. v. Barnes* (Tex. Com. App.) 288 S. W. 121; *Standard Oil Co. v. Detroit, etc., Co.*, 24 Ohio App. 237, 157 N. E. 418; *Hartford Accident, etc., Co. v. Board of Education (C. C. A.)* 15 F.(2d) 317; *Ingold v. City of Hickory*, 178 N. C. 614, 101 S. E. 525.

[3,4] Further, we are of the opinion that upon the facts and under the circumstances of this case appellant Harms waived any right to insist upon arbitration. The laws with reference to arbitration were passed primarily for the purpose of expediting and facilitating the settlement of disputes and to overcome delays caused by litigation. They are not enacted to provide a means of creating delay. *Jardine, Matheson & Co., Ltd., v. Pacific Orient Co.*, 100 Cal. App. 572, 280 P. 697; *Zimmerman v. Cohen*, 236 N. Y. 15, 139 N. E. 764; *Bullard v. Morgan H. Grace Co.*, 240 N. Y. 388, 148 N. E. 559. Section 1282 of the Code of Civil Procedure provides the method by which arbitration may be enforced and enacts that a proceeding may be initiated by the party aggrieved filing a petition for an order directing that arbitration proceed. The default mentioned in section 1282 of the Code of Civil Procedure refers to "the failure to comply with the agreement to arbitrate." On the facts of this case there was no showing that respondent was at any time requested to arbitrate or refused to arbitrate before within twenty-four hours of the actual date of trial. A cause for arbitration is not self-executory but must be enforced by the party seeking the arbitration. Inasmuch as our laws with reference to arbitration are similar to those of New York, New York law on the subject is more than persuasive. In the case of *Bullard v. Morgan H. Grace Co.*, 240 N. Y. 388, 148 N. E. 559, 561, the court says: "But neither the agreement to arbitrate nor the submission is self-executory. A party to an arbitration agreement may break his contract. A remedy is provided in case of his default by Arbitration Law, § 3. A party aggrieved

ed by the failure, neglect, or refusal of another to perform, either under a contract or a submission providing for arbitration, may petition the Supreme Court for an order directing that the arbitration proceed. On such an application the other party may put in issue (a) the making of the contract to arbitrate the questions sought to be submitted to arbitration, or (b) the submission of such questions to arbitration, or (c) the failure to comply therewith. * * * It is only when it is found by the court that a written contract of arbitration has been made * * * covering the question sought to be included in the arbitration, and that a party is in default in the performance thereof, that the court will order the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof."

Appellants did none of the things required by law to enforce their right to arbitrate and on the contrary filed their answer and amended answers in this action. It seems clear to us that if they ever had such right, the facts in the case at bar indicate clearly that it was waived. *Philipp Bauer Co. v. Anderson Chemical Co.*, 206 App. Div. 423, 201 N. Y. S. 438; *Zimmerman v. Cohen*, 236 N. Y. 15, 18, 19, 139 N. E. 764, 765.

[5-7] We find no substance in the point raised by appellants that the amended complaint of respondent did not properly allege the contract between respondent and appellant Harms but was predicated upon a common count in assumpsit. The amended complaint alleged that respondent furnished materials to Harms and that Harms used the same, promised and agreed to pay therefor an agreed price, and that the money became due and was not paid. That a contract may be pleaded in its legal effect and need not be set forth in *haec verba* is thoroughly settled. However, if there were any ambiguity or uncertainty by reason of respondent's failure to plead the contract in *haec verba*, such ambiguity and uncertainty was definitely removed by appellants themselves when they filed their amended answer and set forth the contract in *haec verba*. In *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 321, 73 P. 966, 970, it is said: "Besides, when the legal effect of an instrument is pleaded, and any of its conditions are omitted in the pleading, the omission is cured, if

the defendant, in his answer, sets forth the entire contract."

[8] Furthermore, the action was tried upon the theory that respondent was proceeding upon an express contract, and under such circumstances it has been held: "But in any view of the case defendants suffered no injury. The trial was had upon the issues arising out of the contractual relations of the parties, and whether we call the contract an express or an implied one we cannot see that defendants were injured by any variance between averment and proof." *Gibson v. McReynolds*, 175 Cal. 263, 268, 165 P. 921, 923.

The finding of the court as to the amount due under the contract by Harms to respondent is amply sustained by the evidence and requires no discussion in detail.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



8 Cal.App.2d 115

**CARABELLI v. MOUNTAIN STATES LIFE
INS. CO. et al.**
Civ. 9738.

District Court of Appeal, First District,
Division 2, California.

June 27, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Insurance ☞454

Under policy conditioning "confining illness" benefits on disease resulting in total disability, total loss of time, continuous confinement within doors and regular visits by physician at least once every seven days, proof that during period involved insured suffered total loss of time, but took extended walks from his home and was not visited at least in every seven days by physician, held insufficient to support judgment for insured for "confining illness" benefits.

[Ed. Note.—For other definitions of "Confine; Confinement," see Words & Phrases.]

2. Insurance ☞646(6)

General rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon.

3. Insurance ⇨146(1)

Courts cannot create a new contract for the parties by a forced construction of plain and explicit terms of insurance policy.

4. Insurance ⇨146(3)

Rule that insurance policies should be construed liberally in favor of insured applies only where the policy presents some uncertainty or ambiguity.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Louis Carabelli against the Mountain States Life Insurance Company and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Philip O. Solon, of Oakland, for appellants.

J. E. Hood and D. W. Brobst, both of Oakland, for respondent.

SPENCE, Justice.

Plaintiff brought this action upon an insurance policy seeking to recover the sum of \$1,650 claimed to be due for "confining illness" benefits for 22 months at the rate of \$75 per month. Upon a trial by jury, plaintiff had judgment as prayed, from which judgment defendants appeal.

The pertinent provisions of the insurance policy were as follows:

"Confining Illness. The Company will pay at the rate of \$75.00 per month for disability resulting from disease, the cause of which originates more than fifteen days after the date of this policy, and which confines the Insured continuously within doors and requires regular visits therein, at least once in every seven days, by a legally qualified physician, provided said disease necessitates total disability and total loss of time and provided that no indemnity will be paid for the first seven days of such disability."

"Non-Confining Illness. The Company will pay at the rate of \$75.00 per month for the first month, and \$37.50 per month for the next two months, for disability resulting from disease, the cause of which originates more than fifteen days after the date of this policy and which does not confine the Insured continuously within doors, but requires regular visits, at least once every seven days, by a legally qualified physician, provided said disease necessi-

tates total disability and total loss of time, and provided that no indemnity will be paid for the first seven days of such disability, unless such non-confining illness shall immediately follow confining illness, indemnity for which is payable hereunder."

[1] On April 15, 1930, and while said policy was in force, plaintiff suffered a paralytic stroke which confined him to a hospital for a time, and thereafter confined him to his home for a further period of time. The insurance company made regular payments of \$75 per month to plaintiff until February, 1932, upon the assumption that plaintiff had been confined continuously within doors during all of that period. About the time the last payment was made, plaintiff was seen walking alone and unassisted at a point some distance from his home. An investigator was thereafter sent to plaintiff's home, and when he arrived plaintiff was out. He waited for 20 or 25 minutes and then observed plaintiff walking down the street returning to his home. Some conversation was had on that day concerning plaintiff's condition, and the investigator returned on another day and had a further conversation with plaintiff. The investigator explained the provisions of the policy relating to confining and non-confining illness and tendered plaintiff a draft for \$150 which was claimed by the insurance company to be the full balance due to plaintiff under the terms of the policy relating to nonconfining illness. Plaintiff refused to accept the draft covering the nonconfining illness benefits and thereafter commenced this action seeking to recover benefits under the confining illness clause.

There is no dispute concerning the material facts. It appears that during the time in question, plaintiff was able to get around and regularly took extended walks away from his home upon the advice of his physician. It further appears that plaintiff's doctor did not visit plaintiff in his home at least once in every seven days during this period, but that plaintiff had gone to the doctor's office alone on 16 to 20 occasions. On one occasion the doctor took a trip of 5 weeks' duration during which time he did not see plaintiff at all.

Upon these undisputed facts appellants contend that the evidence is insufficient to support the verdict and judgment. In our opinion this contention must be sustained. Respondent was entitled to the confining illness benefits only in the event of illness

"which confines the Insured *continuously within doors* and requires regular visits therein, at least once in every seven days, by a legally qualified physician." (Italics ours.) The evidence offered on behalf of respondent affirmatively showed that during the period in question his illness did not confine him continuously within doors, and that it did not require regular visits therein by a physician. It was therefore insufficient.

Respondent lays great stress upon the fact that he was totally disabled and suffered a total loss of time during this period. This is conceded by appellants, but is immaterial in the solution of the question before us. It will be noted that under the terms of the policy respondent would not be entitled to either the confining illness benefits or the nonconfining illness benefits unless the disease "necessitates total disability and total loss of time." Respondent brought his action to recover the confining illness benefits and the only question here is whether his evidence was sufficient to show that he was confined "continuously within doors" and required "regular visits therein" at least once in every seven days by a physician.

[2-4] The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. *Ogburn v. Travelers Insurance Co.*, 207 Cal. 50, 276 P. 1004; *First Nat. Bank v. Maryland Cas. Co.*, 162 Cal. 61, 121 P. 321, Ann. Cas. 1913C, 1170. Respondent seems to suggest that the policy here contained some uncertainty or ambiguity, but we are at a loss to conceive of how the conditions entitling the insured to either the confining illness benefits or the nonconfining illness benefits could have been made plainer or more explicit. When respondent had so far recovered that he was no longer confined continuously within doors and no longer

required regular visits therein by a physician but was able to take extended walks and to visit his physician rather than have his physician visit him, it seems entirely clear that his illness was no longer a confining illness within the meaning of the policy.

The views which we have expressed are in accord with those found in numerous authorities from other jurisdictions dealing with similar policies. In *Reeves v. Midland Casualty Co.*, 170 Wis. 370, 174 N. W. 475, at page 476, the court held there was no ambiguity and said: "The indemnity provisions of the policy recognize two degrees of illness: One, when the insured is so ill that he is confined within his house and is therein treated by his physician; the other, when he has so far recovered that he is able to be outside the house and to receive treatment from his physician at places other than the house." Then after discussing the purpose of providing different benefits for these two degrees of illness, the court further said, 174 N. W. 475, on page 477: "The premium rate was no doubt fixed by the character of the liability assumed and, the company having made use of plain and unambiguous words prescribing the period of full liability, the court should not substitute another and different contract for the parties." See, also, *Richardson v. Interstate Business Men's Acc. Ass'n*, 124 Kan. 685, 261 P. 565; *Sheets v. Farmers' & Merchants' Mut. Life & Casualty Ass'n*, 116 Kan. 356, 225 P. 929; *Rocci v. Massachusetts Acc. Co.*, 222 Mass. 336, 110 N. E. 972, Ann. Cas. 1918C, 529. Most of the authorities cited by respondent are distinguishable upon the facts involved, but if any of respondent's authorities may be said to be contrary to the authorities above cited, we do not believe they should be followed.

In view of the conclusion that we have reached with respect to the insufficiency of the evidence, we deem it unnecessary to consider the remaining points urged by appellants.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

7 Cal.App.2d 319

In re SLOAN'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS
ANGELES et al. v. GREEN et al.
Civ. 10120.

District Court of Appeal, Second District,
Division 1, California.
June 3, 1935.

Hearing Denied by Supreme Court
Aug. 1, 1935.

1. Powers ⇨10

Powers created by will were legal accord-
ing to common law of England and of English
colonies in North America before the Revolu-
tion.

2. Statutes ⇨221

If statute as a whole is unambiguous, re-
sort to extrinsic evidence, as to Legislature's
intention in passing it, is improper.

3. Common law ⇨12
Statutes ⇨170

Repeal of statute that abrogated former
statute does not revive former statute, but re-
peal of statute that was declaratory of com-
mon law does not necessarily abolish com-
mon-law rule; the common law more clearly
remaining in force for the reason that the
statute is an affirmance of it (Pol. Code, §
328).

4. Common law ⇨16

It will not be presumed that common law
was repealed by statutory or constitutional
provision unless the language naturally and
necessarily leads to that conclusion.

5. Common law ⇨12

Codal provision that, in all cases provid-
ed for by Code, all "statutes, laws and rules"
theretofore in force, whether consistent or
not with provisions of Code, were abrogated
unless expressly continued in force by it, *held*
not to include consistent common law or its
rules among abrogated provisions (Civ. Code,
§§ 5, 20; Code Civ. Proc. § 18; Pol. Code, §§
18, 19, 328, 4468; Pen. Code, § 23).

[Ed. Note.—For other definitions of
"Law," "Rule" and "Statute," see Words
& Phrases.]

6. Powers ⇨3

Repeal of statute by which pre-existing
common-law right to make power of appoint-
ment was declared *held* to have had no effect
other than to revive the common-law rule
(Civ. Code, §§ 5, 20; Code Civ. Proc. § 18;
Pol. Code, §§ 18, 19, 328, 4468; Pen. Code, §
23).

7. Wills ⇨75

According to common law of England, in
order that power of appointment may be val-
idly exercised by means of a will of a do-

nee of such power, donee's will, in its formal
execution, must be valid.

8. Wills ⇨70

Validity of will as regards disposition
of personality depends upon law of testator's
domicile.

9. Wills ⇨70

That donee of power of appointment
seeks to exercise power by will has no effect
upon question of whether instrument, accord-
ing to law of testator's domicile, constitutes
a valid will, as distinguished from valid ex-
ercise of power of appointment.

10. Wills ⇨70

Where testator domiciled in California
gave son power to appoint who should take
California realty given in trust, son's will
undertaking to execute power *held* provable
in California, though it was invalid both as
a will and as purported exercise of power ac-
cording to law of his Massachusetts domicile
because son was not 21 years of age when
will was executed.

11. Powers ⇨36(1)

In absence of statute to contrary, no
member of a class designated by donor of a
power may be entirely excluded by donee in
exercising power of appointment from at
least a substantial participation in distribu-
tion of trust fund or estate.

12. Powers ⇨36(1)

Where power to appoint who should take
realty was limited to donee's "heirs," ap-
pointment of donee's maternal aunt to exclu-
sion of two paternal aunts *held* invalid exer-
cise of power.

[Ed. Note.—For other definitions of
"Heirs," see Words & Phrases.]

13. Trusts ⇨29

"Precatory" is properly applied to an ex-
pression of a trustor wherein a hope, a wish,
a desire, a recommendation, or a request is
indicated by him, and the words by which a
"precatory trust" is created constitute an
"entreaty" that is beseeching, or suppliant,
or prayerful in nature.

[Ed. Note.—For other definitions of
"Precatory Trust," see Words & Phras-
es.]

14. Wills ⇨692, 693(1), 694

Testamentary power of appointment pro-
viding that, if donee died before 30 years of
age, trust fund should go to the heirs of
donee as per his last will, *held* mandatory,
not precatory, and where donee improperly
exercised power, realty must be distributed
to donee's heirs.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the Matter of the Estate of William Wilson Sloan, Jr., deceased. Proceeding by the Security-First National Bank of Los Angeles, testamentary trustee, and Eleanor Edwardes Robinson, also known as Eleanor T. Robinson, claimant, against Sarah Sloan Green and Leafie Sloan-Orcutt, claimants, for the distribution of a trust estate. From an adverse judgment, Sarah Sloan Green and Leafie Sloan-Orcutt appeal.

Reversed and remanded, with directions.

Hill, Morgan & Bledsoe, Benjamin F. Bledsoe, and Charles P. McCarthy, all of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, Louis W. Myers, John A. Powell and Albert Parker, all of Los Angeles, for respondent Robinson.

HOUSER, Justice.

The instant appeal involves several different questions that have arisen on a petition for the distribution of a trust estate.

By a provision in the will of the testator, all the real property of the decedent was devised to Los Angeles Trust & Savings Bank, a corporation, to be held by it in trust for the benefit of the widow of the testator during the lifetime of the former, and upon her death to pay the net income derived from the estate to the son of the testator, William Wilson Sloan, 3d, until he should reach the age of 30 years; at which time the trust was to be terminated and the corpus of the trust was to be distributed by a court of competent jurisdiction to said son. The will then provided that if, after the death of the widow of the testator, the said son should die under the age of 30 years, "said trust fund and any real estate then held by said trustee for this trust shall go to, belong to, vest in and be distributed by a court of competent jurisdiction to the heirs of said William Wilson Sloan 3rd as per his last will and testament."

In the course of events, and following the death of the testator, the trustee entered upon its duties in connection with the administration of the trust; the widow of the testator died; and the real property of the estate was converted into personal property. Some time thereafter, and before he reached the age of 21 years, the

son of the testator died, domiciled in the state of Massachusetts, wherein he had executed an instrument that purported to be his last will and testament and by which, in assumed accord with the said power conferred upon him by the provision of the will of his late father, he designated his maternal aunt, Eleanor T. Robinson, as his heir to whom the entire estate of the testator herein was to be distributed. Although, respecting its validity, the will of the son apparently was executed in accordance with all legal requirements of the state of California, by the laws of the state of Massachusetts, because of the fact that at the time of the execution of the will the son had not attained the age of 21 years, in certain probate proceedings in the latter state, instituted with reference to such will, it was ruled not only that said will was not entitled to be admitted to probate, but as well that the petition for the qualified probate of the will for the purpose of establishing the exercise by the son of the power of appointment conferred upon him by the provision contained in the will of the testator herein should be and it was denied; and each of said orders has become final.

The trustee named in the will of the testator herein having been succeeded by Security-First National Bank of Los Angeles, a corporation, and it having presented to the superior court a petition for an order of distribution of said estate, and respective answers to said petition having been filed in said court not only by said Eleanor T. Robinson, who was the appointee under the purported will of the son of the testator, but as well by two other heirs of said son (the latter being his paternal aunts), and upon the hearing of such petition the said court having made its order in the premises by which it was adjudged that the said Eleanor T. Robinson was entitled to distribution to her of the entire estate of the testator herein, the said two other heirs have appealed from said order or judgment.

As a compelling reason for an order of reversal of the judgment or order made by the superior court, it is urged by the appellants that in the state of California powers of appointment are of no validity, and consequently that the attempted exercise by the son of the testator of the purported power contained in the will of the latter was void and of no legal effect.

In support of such contention the appellants present the argument in substance

that, although at one time in the legal history of this state the creation of such a power was expressly authorized by statute (Civ. Code 1872, §§ 878 to 946), long before the will by the testator herein was executed, such statutes had been repealed (Code Amendments, Stats. 1873-74, p. 223); and that at no time since such repeal had other statutes of that character been reenacted; from which situation (so the appellants assert) the attempted creation by the testator of such a power became a nullity. Citing particularly *In re Estate of Fair*, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am. St. Rep. 70.

[1,2] It is undeniable that powers of the nature of that here involved were considered legal as the common law was administered both by the English courts and at least by those of this country which, prior to the Revolution, operated as colonies of the British government. Whether (in the absence of statute so providing), owing to the origin of ownership of the state of California by the Mexican government, the common law in its fullness would exist in this state is not necessary of consideration (to the contrary, see *In re Estate of Fair*, 132 Cal. 523, 534, 60 P. 442, 64 P. 1000, 84 Am. St. Rep. 70; 12 Cor. Jur. 200 et seq., and authorities there cited; *Marsters v. Lash*, 61 Cal. 622; *Norris v. Harris*, 15 Cal. 226); for by the terms of section 4468 of the Political Code, adopted in 1872, and based upon the Statutes of 1850, at page 219, it is provided that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state." And by the ruling in the case of *Martin v. Superior Court*, 176 Cal. 289, 293, 168 P. 135, 136, L. R. A. 1918B, 313, it was declared that the common law embraced "the whole body of that [common-law] jurisprudence as it stood, influenced by statute, at the time when the Code section was adopted." See, also, 5 Cal. Jur. 253, and authorities there cited. Consequently, since the right of power of appointment existed at common law, which right was carried into the law of this state, both by the Statute of 1850, at page 219, and thereafter on the adoption of the Code in 1872, by section 4468 of the Political Code (in the assumed absence of any later statute, direct or cognate, by which the exercise of such common-law right is inhibited, or in the

absence of some impelling judicial precedent or construction whereby the denial of such right is clearly and concisely indicated), it should follow that unless the effect of the repeal of the statute by which such common-law right was recognized and specially authorized was also to repeal the original common-law right, such common-law right is still in full force and effect. In that regard and in affirmation of the claimed legislative intent to abolish the use of powers in general, the comment made by the code commissioners in recommending the repeal of the statute, as stated in the concurring opinion in *Re Estate of Fair*, 132 Cal. 523, 552, 60 P. 442, 64 P. 1000, 1005, 84 Am. St. Rep. 70, was that the "whole chapter on 'Powers,' [was] wholly unsuited both to the wants and habits of the people. * * *" However, in that connection, and somewhat reflecting upon the propriety of a court in construing a statute to take into consideration evidence of the intention of the Legislature, de hors the language employed in such statute, it is a rule of construction that if the statute as a whole be unambiguous, resort to extrinsic evidence of the intention of the Legislature in passing the act is improper. So much is clearly indicated by the language employed in the opinion in the case of *McGarahan v. Maxwell*, 28 Cal. 75, 95, wherein the court said: "We have not felt warranted in resorting to the reports or debates in Congress, upon the passage of the Act of 1862, to ascertain its true meaning and construction, and we adopt the language of Mr. Chief Justice Taney, in *Aldridge v. Williams*, 3 How. [9] 24 [11 L. Ed. 469], as clearly expressing the law in this respect. He says: 'In expounding this law, judgment of the Court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the time in which it was passed.' (*Leese v. Clark*, 20 Cal. [387] 425; *Forrest v. Forrest*, 10 Barb. [N. Y.] 46.) The lan-

guage of the Act is sufficiently plain and unambiguous to indicate the intention of Congress. * * *

To the same effect, see *Davies v. City of Los Angeles*, 86 Cal. 37, 42, 24 P. 771.

[3] The language of the repealing statute herein is that, "Title Five of Part Two of Division Two, on Powers, of the Civil Code, embracing sections of said code from section eight hundred seventy-eight to nine hundred forty-six, inclusive, is repealed." Code Amendments, Stats. 1873-74, p. 223, § 123. It is therefore clear that such unambiguous language will not admit of construction. But notwithstanding the authority to which reference just has been had, the author of the opinion proceeds to enlarge somewhat upon the comment asserted to have been made by the code commissioners (*supra*), to the apparent conclusion "that the repeal meant, not the restoration of common-law powers, but a further simplification and advance over even the New York system, by the abolition of many of the powers which that state had preserved, and the perpetuation of only such as were considered suitable to the simpler wants and habits of the people of this state." In *re Estate of Fair*, 132 Cal. 523, 553, 60 P. 442, 64 P. 1000, 1005, 84 Am. St. Rep. 70. However, from a consideration of the immediately ensuing language of that opinion, it may be somewhat doubtful that even its author had the fullest confidence in the soundness of his own logic; for in his next succeeding statement he says: "*But, if it be conceded that common-law powers in trust do exist in this state,*" etc. But aside from that situation, the apparently well-established exception should be noted to the general rule, to wit, in substance, that the repeal of a statute that abrogates a former act of the Legislature does not have the effect of reviving such former law; or, as declared by section 328 of the Political Code, "No *act* or part of an *act*, repealed by another act of the legislature, is revived by the repeal of the repealing act without express words reviving such repealed act or part of an act." The exception to such rule is concisely stated in 12 Corpus Juris, at page 188, as follows: "The repeal of a statute that is declaratory of a rule of the common law does not necessarily effect the abolition of the common-law rule; but the common law more clearly remains in force

for the reason that the statute is an affirmation of it." And that principle has been recognized in part in the case of *Callet v. Alioto*, 210 Cal. 65, 68, 290 P. 438, where several authorities are cited in its support. With reference thereto, the syllabus epitomizes the decision made by the court as follows: "The rule that a cause of action or remedy dependent upon a statute falls with a repeal of the statute, does not apply to an existing right of action which has accrued to a person under the common law, as in such case the cause of action is a vested property right which may not be impaired by legislation."

In the case of *Ventura County v. Clay*, 112 Cal. 65, 44 P. 488, it was held that the repeal of a statutory provision which was the same in substance as another statutory provision previously enacted did not affect the operation of the latter. 23 Cal. Jur. 714.

The case of *Reeves & Co. v. Russell* (1914) 28 N. D. 265, 148 N. W. 654, 655, L. R. A. 1915D, 1149, is in point. In reliance upon supporting authorities therefor, and in consequence of extended reasoning that embraced a careful consideration of pertinent California statutes and authorities, including section 20 of the Civil Code, it is ruled that (syllabus): "Where a statute either declaratory of or changing the common law is repealed without express provision against the revivor of the common law, the common law is ipso facto revived by such repeal, which repeal will be regarded in the absence of a contrary legislative intent appearing as an affirmation of the common law, reviving the same."

In addition thereto and as apparently applicable to the situation with respect to the effect of the repeal of a statute that in substance is in recognition or declaratory of a rule of common law theretofore in existence, the provisions of section 20 of the Civil Code (enacted in 1872 and identical with section 18, Code of Civ. Proc., and section 18, Pol. Code) should be given consideration. It is there provided that: "No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed or abrogated. * * *"

It would therefore seem that, unless it be true that by a proper construction of the broad language of such statute its application should be limited to former existing statutes, as distinguished from common law and its rules; and in consequence, it be indicated that the real purpose of the legislation was to eliminate from our rules of civil conduct the force and effect of any pre-existing Mexican "statute, law, or rule" of whatever origin or nature, by which, prior to the acquisition from the Mexican Republic of the territory of which the state of California is now a part, the people of this state were bound; or unless the apparently plain language employed in section 20 of the Civil Code is to be considered as modified by other cognate statutes—it should be obvious that, although "consistent with the provisions of this code," the common law and its rules with respect to the right to delegate or to create a power were not "continued in force"; but that "whether *consistent* or not with the provisions of this code," such common law and its rules, "unless expressly continued in force * * *, [were] repealed or abrogated."

It may be noted that nowhere within the statutes of this state may be found a direct declaration either that the common law or any of its rules are either expressly or at all continued in force; also, that in connection with the provisions of section 20 of the Civil Code, as impliedly indicating a contrary intention on the part of the Legislature, by the provisions of section 19 of the Political Code (section 23, Penal Code), which immediately follows section 18 of the Political Code (identical with section 20 of the Civil Code), many different then-existing statutes are either distinctly specified or identified as "continuing in force, notwithstanding the provisions of the codes. * * *" But no reference is had therein to powers generally, or in particular to powers of appointment. However, in that regard, and as indicating an impelling influence in the judicial construction that impliedly has been placed upon the provisions of section 20 of the Civil Code, to the effect that when not inconsistent with or repugnant to a statute the common law is "the rule of decision" in this state, attention should be directed to the language employed in section 5 of the Civil Code, as well as in section 4468 of the Political Code. The former statute provides that: "The provisions of this code, *so far as they are substantially the*

same as existing statutes or the common law, must be construed as *continuations* thereof, and not as new enactments."

As hereinbefore has been set forth, section 4468 of the Political Code contains the declaration that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, *is the rule of decision* in all the courts of this state."

[4, 5] From an examination of the language employed in the said several statutes it may be noted that, although by section 20 of the Civil Code it is provided not only that "no statute, law, or rule is continued in force because it is consistent with the provisions of this code," but that "unless expressly continued in force" it is "repealed or abrogated," by the terms of section 5 of the Civil Code, in substance it is declared that statutes that are "*substantially the same* as * * * common law * * * must be construed as *continuations* thereof." And in the case of *Churchill v. Pacific Improvement Co.*, 96 Cal. 490, 493, 31 P. 560, it was held that the word "construed," as used in section 5 of the Civil Code, should carry the meaning generally accorded to the word "regarded" or "considered." So that by the provisions of the one statute, simply because a rule of common law is consistent with a statute does not mean that it is continued in force; but that if that is its sole virtue, it is repealed; whereas, by the provisions of the other statute, if the pre-existing common law "is substantially the same" as a new statute, the latter is to be considered, not "as a new enactment," but is to be regarded as a continuation of the former. It therefore becomes obvious that, as far as concerns common law or rules that are consistent with existing statutes, the respective provisions of the two sections of the Civil Code to which reference has been had are somewhat in conflict one with the other. In such situation, the language of section 4468 of the Political Code may be helpful. In effect, as hereinbefore has been set forth, it provides that if the common law is neither repugnant to nor *inconsistent* with the written law, the common law "is the rule of decision." But manifestly, if the common law were either repugnant to or inconsistent with a statute, even in the absence of statutory provision to that effect, the latter would prevail. In other words, in order to be

"the rule of decision," the common law must be *consistent* with the Constitution or the statutory provision. But if a common-law rule, sometimes somewhat variable and vague, and to that extent precisely indeterminate, especially if drawn from *lex non scripta*, is to be regarded as "the rule of decision" when, and only when, it is "*consistent*" with the statute, it must be that (according to the letter of the statute) the words of the statute are then superseded by the common-law rule, even though the provisions of the statute be plain, certain, and unambiguous, nor suffering from any of the common infirmities that attach to an unwritten law. Otherwise stated, if *inconsistent* with the statute, the common law is of no effect; but if *consistent* with the statute to the extent that it is in exact conformity or in substantial harmony therewith, the common law overrules the statute and becomes "the rule of decision." Without meaning to challenge the power of the Legislature in the premises to enact such a law, nevertheless it is most apparent that such a result of its act, if not an absurdity, at least would be wholly at variance with the otherwise well-established rule that in such conditions the statute takes precedence and becomes "the rule of decision." However, if by being "consistent" is meant (as the statute might seem to indicate) "not repugnant to or inconsistent with" the *essential* provisions of the statute—thus permitting the existence or the operation of common law minor, additional, or comparatively unimportant substantive law or procedure with reference thereto—the statutory provision that the common law, thus limited, shall be "the rule of decision in all the courts of this state," may not be so inharmonious with common legal understanding of the force and effect ordinarily attributable to statute law. On the other hand, if (as is present in the instant matter) one may assume the existence of a state of facts to which no statutory rule were in any wise applicable, it would then be possible to give full force to the declaration that "the common law * * * is the rule of decision"; for in that situation the common law would be neither "repugnant to nor inconsistent with" either constitutional or statutory provision. Nor, because of the nonexistence of any written law on the subject, would the common law thereon be "consistent with the provisions of this code." To be either consistent, or inconsistent, with the provisions of the Code presupposes the existence of

some particular Code provision as to which such consistency or inconsistency may relate. Hence, with reference to the particular situation regarding and affecting which it was proposed to apply the common law (there being no code provision thereon), no conflict would be present with reference to the terms of section 20 of the Civil Code by which it is provided that "all statutes, laws, and rules, * * * whether consistent or not with the provisions of this code," are repealed or abrogated. Furthermore, as is concisely stated in 12 Corpus Juris, at page 202, "it will not be presumed that the common law was repealed by a statutory or a constitutional provision unless the language naturally and necessarily leads to that conclusion." See, also, 5 Am. Dig. (Dec. Ed.) p. 460, et seq. Moreover, by judicial construction, as is evidenced by numerous authorities cited in 5 California Jurisprudence, at page 255 et seq., particularly including *In re Elizalde's Estate*, 182 Cal. 427, 188 P. 560, and *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135, L. R. A. 1918B, 313, "the common law is the rule of decision in all the courts of California." But that "the rule of decision" does not include "the civil law, nor the 'ancient common law' of the civilians, nor the Mexican law," see *Lux v. Haggin*, 69 Cal. 255, 379, 384, 4 P. 919, 10 P. 674. However, notwithstanding the difficulty that may arise from what may be considered a paradoxical situation, it substantially appears from the provisions of section 5 of the Civil Code, as well as from those provisions of section 4468 of the Political Code to which attention hereinbefore has been directed, that the language of section 20 of the Civil Code does not include "consistent" common law or its rules among those "laws or rules" which are "repealed or abrogated."

In addition thereto, an examination of the provisions of sections 715, 716, and 772 of the Civil Code, which were enacted in 1872 and which in 1874 were in effect at the time when the statute that recognized the existence of the common-law rule with reference to the right to create a power of appointment was repealed, it becomes evident that in effecting such repeal the Legislature had no intention of abrogating the prior and then existing common-law rule that related to the right to create a power of appointment; because each of such statutes, which then, and which ever since have been, in force, was devoted and related to some sort of restraint or limita-

tion upon the recognized right of the power to suspend the alienation of property. Besides, as more clearly indicating a lack of intention on the part of the Legislature to repeal or to disturb such pre-existing common-law rule with respect particularly to powers of appointment, it may be observed that section 781 of the Civil Code then and ever since has provided that: "A general or special *power of appointment* does not prevent the vesting of a future estate limited to take effect in case such power is not executed."

Likewise, former sections 1330 and 1331 of the Civil Code, which were enacted in 1872 and thus remained intact until combined in one statute and re-enacted in 1931 as section 125 of the Probate Code, are declarative of what property shall be deemed passed by devise "of all the testator's real or personal property." And it is there further provided that such a bequest or devise shall include "property embraced in a *power to devise*." Again, former section 900 of the Civil Code was enacted in 1872, but was repealed in 1874 (Code Amendments 1873-74, p. 222) at the same time and by the same act that the general statute here in question was repealed; but it was immediately re-enacted as section 860; and from that time until the present is still the statutory law with reference to the subject to which it relates. Like the other statutes to which attention hereinbefore has been directed, it contained, and now contains, a reference to powers which apparently is broad enough to include a power of appointment. It is as follows: "Where a *power* is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power."

Not suggested as being of more than persuasive force, but as affording some indication of common understanding of the state of the law not only by the laity and the lawyers, but by the courts as well, it may be noted that in this state at all times since the enactment of the repealing statute here in question, the exercise of the assumed right of power of appointment has been in general use, with the inevitable result that in many cases the courts of this state have been required to render, and have rendered, decisions that have involved some questions regarding the use of such a power; and that in none of such adjudications has the legality of the power of

appointment been either expressly or impliedly denied. To the contrary, although possibly referred to as an "open question" in each of several of such cases, the validity of the exercise of such power is assumed or taken for granted. See *Elmer v. Gray*, 73 Cal. 283, 14 P. 862; *In re Estate of Dunphy*, 147 Cal. 95, 81 P. 315; *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306; *Todd v. Superior Court*, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938; *In re Estate of Murphy*, 182 Cal. 740, 190 P. 46; *In re Estate of Bowditch*, 189 Cal. 377, 208 P. 282, 23 A. L. R. 735.

Furthermore, as a certain indication of additional recognition by the Legislature of this state of the existence of such right, it may also be noted that the California Inheritance Tax Act (St. 1921, pp. 1500, 1502, § 2, subd. (6) contains the provision that "whenever any person * * * shall exercise a *power of appointment* * * * such appointment, when made, shall be deemed a transfer taxable under the provisions of this act," etc.

[6] From a consideration of the foregoing, the conclusion follows that the repeal of the statute by which the pre-existing common-law right to make a power of appointment was declared had no effect upon such right other than to work a revival of it, or one might say, a restoration of its natural parentage; and since it has not been suggested that the common-law right is either repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, as is said in the case of *McDaniel v. Cummings*, 83 Cal. 515, 518, 23 P. 795, 8 L. R. A. 575, it is manifest that the whole question is solved whenever it is determined what the common-law rule is.

[7] According to English decisions, dating from as early as 1707, in order that a power of appointment may be validly exercised by means of a will of a donee of such power, it is necessary that in its formal execution the will of such donee be valid. So held in *Attorney-General v. Barnes*, 2 Vern. 597, 23 English Reports (Full Reprint), 990, where, although the codicil of a will was properly witnessed, the original will was not. The same ruling where the will was witnessed by only two persons—the statute requiring three. *Wagstaff v. Wagstaff*, 2 P. Wms. 258, 24 English Reports (Full Reprint) 721. Likewise, where the requirement was that the will, or any writing purporting to be the

will, of the donee be "under hand and seal," and it appeared that as to the will of the donee his seal had been omitted. *Dormer v. Thurland*, 2 P. Wms. 506, 24 English Reports (Full Reprint) 837. Also, going further, in *Hodsdon v. Lloyd*, 2 Brown's C. C. 535, 29 English Reports (Full Reprint) 293, where it was held that because a woman who was the donee of a power had married after she had made her will, by means of which will such power was attempted to be exercised, the appointment was illegal. To the same effect, see the numerous cases digested in note under the title "Validity of Donee's Will," in 64 L. R. A. 892 et seq., which decisions were dependent upon different respective circumstances that affected the validity of the will, many of which being equally technical or drastic as were the respective facts hereinbefore set forth. Perhaps as contrary to the weight of authority, as hereinafter set forth, in the course of reasoning upon a question that related to the legal effect in one state of the order by which the will of the donee of the power was admitted to probate in another state, in the case of *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411, 412, 25 Am. St. Rep. 894, in substance the court made the broad declaration that if a power is to be exercised by means of a will, it is necessary that the will be made "as the law requires it to be made; so made as, under our statute, that it would be effectual to pass the trustee's own property."

In the instant matter, as hereinbefore has been stated, at the date when the donee of the power of appointment executed his will in the state of Massachusetts, wherein he was domiciled, and in said will attempted to exercise such power of appointment, he lacked but thirty-two days of being twenty-one years of age. It appears that by the laws of the state of Massachusetts, because of the fact that at the time when the donee of the power executed his said will he was not of the age of twenty-one years or over, he was disqualified from making a valid will. But by the terms of section 1270 of the Civil Code of this state, which was in force at the time in question, it was provided that "every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal," etc. See, also, Probate Code, § 20. In no respect other than that the donee of the power was lacking in statutory age for the purpose of making

a will, does it appear that his will was not executed in full accordance with legal requirements of the state of Massachusetts. It therefore becomes apparent that one of the principal points that should be, and is, raised by the instant appeal is whether, in this state, the legality of the exercise of the power of appointment by the donee thereof is to be determined with reference to the laws of Massachusetts relating to the age qualification of the donee of the power in the execution of his will, or whether the question of the legality of the will of such donee, as it affects the exercise of such power, is to be determined on the basis of the provisions of section 1270 of the Civil Code, now included in section 20 of the Probate Code of this state.

[8,9] It is a general rule, supported by the weight of authority with reference thereto, that the question of the validity of a will, at least as far as it purports to affect the disposition of personal property, is determinable by the law of the state that is the domicile of the testator. And it is also a well-established principle of law that the fact that by such an instrument the testator seeks to exercise a power of appointment has no effect upon the question of whether, according to the laws of the state or sovereignty wherein the instrument purportedly is executed and in which the testator is domiciled, it constitutes a valid will, as distinguished from a valid exercise of the power of appointment.

In the case of *D'Huart v. Harkness*, 34 Beav. 324, 55 English Reports (Full Reprint) 660 (not strictly in point), the facts and the ruling thereon are indicated by the syllabus thereof, as follows: "Personal property was held, under an English will, in trust for such person as an English lady should, by her last will in writing duly executed, appoint. She afterwards married a Frenchman, and died domiciled in France, having appointed the property by an unattested will, valid according to the law of her domicile, and admitted to probate in this country: Held, that this will was a valid execution of the power."

See, also, to the same effect, *In re Price*, 69 L. J. C. H. (N. S.) 225, [1900] 1 Ch. 442.

Of course, what the ruling would have been had the will been invalid according to French law, but valid according to English law, is not disclosed in either of such cas-

es. However, although considered solely as a will, the instrument may lack validity in the place of the domicile of the testator, and consequently be ineffectual for the purpose of serving as a foundation for title, nevertheless, even though the exercise of the power to make an appointment be limited or restricted to the execution by the donee of such power by a will (which presumably must be a valid will)—it would seem to be an established rule that, as far as the exercise of such a power of appointment is concerned, although according to the laws of the domicile of the donee of such power, neither the will, nor the exercise of such power by means of a will, be valid—if such will be executed in accordance with the law existing in the state or sovereignty of the donor of the power, and the subject-matter of the power be personalty located within the jurisdiction wherein the power was created, it would be entitled to be admitted to probate “as a will for the purpose of the appointment, though it may not be admissible for other purposes.” *Murphy v. Deichler*, [1909] L. R. A. C. (H. L.) 446.

In the case of *Tatnall v. Hankey*, [1838] 2 Moore, P. C. 342, 12 English Reports (Full Reprint) 1036, it was held that a will made in Paris in accordance with English law requirements by a woman who afterwards became domiciled in Naples, where she died, and by which will she exercised a power of appointment, was valid in England where the subject of the power (personal property) was located, even though according to Neapolitan law both the will and the power were invalid. And that principle was followed in *Barnes v. Vincent*, 5 Moore, P. C. 201, 13 English Reports (Full Reprint) 468; *In re Sophia Alexander* (1860) 8 W. D. 451, 29 L. J. (P. & M.) 93; *Goods of Hallyburton*, [1866] L. R. 1, P. & M. 90; *Goods of Huber*, L. R., Prob. Div. [1896], 209; *Pouey v. Hordern*, [1900] L. R. 1, Ch. Div. page 492.

In the case of *Murphy v. Deichler*, [1909] L. R. A. C. (H. L.) page 446, it appeared that an English woman, who was the donee of a power of appointment, married a German and thereafter became a naturalized German subject, with a German domicile. While so domiciled and within German territory, she exercised her power of appointment by a will duly attested according to the laws of England, but invalid by German law. Pursuant to trial, an order was made “that the executors

and trustees should be at liberty to apply for a grant of letters of administration with the alleged will and codicil annexed, limited to the estate and interest of the testatrix in the property over which she had a power of appointment.” Lord Loreburn, L. C., delivered an opinion with reference thereto as follows:

“My Lords, the learned counsel for the appellant have urged all the arguments which could have been urged in support of the appeal, and I think they have perhaps shewn that seventy years ago their arguments might possibly have prevailed. But it has been established, I think not unreasonably, that it is a proper exercise of an English power of appointment by will if it be exercised by a will in the English form, even though the person appointing be domiciled abroad and the will be not validly executed according to the law of domicile. The document may be admitted to probate as a will for the purpose of the appointment, though it may not be admissible for other purposes.

“I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated.

“Under these circumstances I think your Lordships will be well advised to adhere to the decision of the Court of Appeal in *Ireland*.”

In 49 *Corpus Juris*, at page 1287, the following statement of the law is made: “A power to be exercised by an instrument in the nature of, or purporting to be, a will is well exercised by an instrument of a testamentary character, although it is void as a will * * *.”

In treating the same subject, in 21 *Ruling Case Law*, at page 794, it is said: “So far as the sufficiency of the execution of a power relating to personal property given by will is concerned it seems to be settled that the law of the domicile of the donor, and not of the donee or of the place where it is executed, controls.”

And in similar situations the American cases have indicated that the principle so concisely announced in *Murphy v. Deichler*, to which reference hereinbefore has been had, should prevail.

In the case of *Sewall v. Wilmer* (1882) 132 Mass. 131, it was held that the will of

a married woman, who was the donee of a power of appointment, and by which will she exercised such power, was valid in Massachusetts, which was the domicile of the donor of the power (and the situs of the property involved), even though the will of the donee of the power was executed in the state of Maryland, where the donee was domiciled and where she died, and in which state the execution of the power of appointment was invalid.

In the case entitled *In re New York Life Insurance & Trust Co.* (Sur. Ct.) 139 N. Y. S. 695, 706, affirmed in 209 N. Y. 585, 103 N. E. 315, it was held that, although domiciled in Italy at the time of her death, the will of a woman by which she exercised a power of appointment as to property located in New York was valid as to the exercise of such power, notwithstanding the fact that by the law of Italy, in that regard, the will was invalid.

In principle, to the same effect, see *Cotting v. De Sartiges*, 17 R. I. 668, 24 A. 530, 16 L. R. A. 367; *Rhode Island H. T. Co. v. Dunnell*, 34 R. I. 394, 83 A. 858, Ann. Cas. 1914D, 580; *Lane v. Lane*, 4 Pennewill (20 Del.) 368, 55 A. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122.

With respect to the point that in circumstances such as are present in the instant case, the law of the domicile of the donor of a power of appointment controls as to the question of the validity of the exercise of such power, the opinion in the case entitled *In re Estate of Bowditch* (1922), 189 Cal. 377, 208 P. 282, 283, 23 A. L. R. 735, contains several declarations as to the law that are particularly applicable herein. In that case the donor of the power was domiciled in Massachusetts, but at the time of her death the donee thereof was domiciled in the state of California—which situation, as it relates to the respective domiciles of the donor and the donee, is exactly the opposite of that which obtains in the instant matter. On appeal from the order or judgment rendered therein by the lower court, the Supreme Court of this state said in part that “the ultimate question, therefore, is whether the will of Charlotte Bowditch [the donee, who was domiciled in California], in so far as the exercise of this power of appointment is concerned, is governed by the laws of California.” It was decided that the laws of the state of Massachusetts were controlling. The following excerpts may be noted:

“It is obvious that the exercise of the power of appointment in the will of Char-

lotte Bowditch [the donee] is governed by and dependent upon the laws of California *only in the event that the personal property which is the subject of the said power is within the jurisdiction of this state.* As previously stated, the personal property here involved is not actually within the state of California. Neither is it constructively within this state, under the doctrine of *mobilia sequuntur personam*. ‘That maxim (*mobilia sequuntur personam*), universally applied in the jurisdiction of all civilized nations, is that the personal estate of a decedent, wherever it may in fact be located, is, for the purposes of succession and distribution, deemed to have no other locality than the domicile of the decedent.’ [Citing case.] But personal property which is the subject of a power of appointment does not acquire a constructive situs in the state of the domicile of the donee of the said power under this theory, for such property is no part of the estate of the donee. * * *

“It would be entirely competent for the state of Massachusetts to authorize a transfer of the property in accordance with an appointment in a will *invalid under the laws of California*. *Sewall v. Wilmer*, 132 Mass. 131.”

Quoting from the brief of respondent herein: “To paraphrase the words of the court, quoted above, on a converse state of facts (such as is presented by the record herein), it would be entirely competent in the *state of California* to authorize a transfer of the property in accordance with an appointment in a will *invalid under the laws of Massachusetts*.”

In support of the contention made by the appellants herein to the effect that “the alleged will of the donee, * * * cannot be relied on as an exercise of the purported appointment because it has not been admitted to probate,” it is noted that in the case of *Castro v. Richardson* (1861) 18 Cal. 478, the principle is enunciated that a will cannot be given in evidence as the foundation of a right or title unless it has been duly probated. Also, that in *Re Estate of Patterson*, 155 Cal. 626, 636, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625 (and perhaps in *McDaniel v. Pattison*, 98 Cal. 86, 27 P. 651, 32 P. 805), the same general thought is expressed. Nevertheless, in each of the later cases of *In re Estate of Johnston* (1922) 188 Cal. 336, 206 P. 628, and *In re Estate of Bassett* (1925) 196 Cal. 576, 238 P. 666, 669, a ruling was made

which at least is out of harmony with the decision in the case first cited in this paragraph. In the Johnston Case, in reliance upon a ruling made in *Re Estate of Thompson*, 195 Cal. 763, 198 P. 795, it was held that, without first proving that a will had been admitted to probate, its execution might be shown (by one witness, instead of as ordinarily by two, as required on proof of the execution of a will), for the purpose of establishing the existence therein of a provision by which all former wills made by the testator were revoked. And in the Bassett Case the same rule was invoked for the purpose of establishing the fact in the same manner that the will in question contained provisions that were "wholly inconsistent with the terms of the former will."

[10] It is therefore concluded that, although by the laws of the state of Massachusetts neither the will nor the purported exercise of the power of appointment may have been valid, by the laws of the state of California, even conceding (without deciding) that the will itself was invalid, the provisions thereof with reference to the exercise of the power of appointment were provable in this state.

If it may be assumed that the conclusions hereinbefore indicated are correct, the next essential question that is presented for the consideration of this court relates to the proper effect that should be given to the appointment as exercised by the donee thereof. In that connection, naturally one of the most important factors is the foundational or creative language of the power as used by its donor, its pertinent direction being that if the donee thereof should die before reaching the age of thirty years, the trust fund "shall go to, belong to, vest in, * * * the heirs of said * * * (donee) as per his last will and testament."

As hereinbefore has been set forth, the donee died even before he attained the age of twenty-one years. Nevertheless, he left a purported will by the terms of which he appointed one of his heirs as the person to whom such trust fund "shall go to, belong to, vest in," etc. He left other "heirs" who, by his failure to provide for them in his will, were effectually excluded or omitted from any appointment under the power of which he was the donee. In such circumstances, it is contended by the appellants herein that the attempted exercise by the donee of the power of appoint-

ment was invalid, in that by the language employed by the donor of the power, the donee thereof was limited and restricted to a distribution of the trust fund to his "heirs"; whereas, he selected and appointed but one of such heirs, to the exclusion of all the other of his heirs.

[11] At the time that the power was created, it well may be that the donor thereof was aware of and had in mind the fact that should the donee of the power survive for any considerable time, the personnel of his "heirs" might change from time to time. For example, dying at the time he did, the donee left surviving as his "heirs" at least both the appellants and the respondent herein; but had he lived until just before he reached the age of thirty years, and in the meantime some of his former "heirs" had died, or had the donee married and his wife had given birth to children who survived their father, it is obvious that the personnel of the class who might have become entitled to a distribution of the assets of his estate, if any, would have varied, just as the circumstances to which reference has been had changed from time to time. Hence, it may have been deemed advisable, if not necessary, that general words of description should be employed that would meet and be adaptable to changed circumstances, and fittingly provide for those individuals who, in accordance with the laws of succession, on the death of the donee of the power, might or would become entitled to inherit his estate and to a distribution thereof. It would therefore seem clear that by the use of the word "heirs," in creating the power of appointment, and in thus indicating the persons who ultimately might or would become the recipients of his bounty, the donor of such power used a word that was general in its nature, but which at the same time was accurately descriptive; in other words, a class was designated. In such circumstances, the law is fairly well established that in the absence of controlling statute to the contrary, in exercising the power of appointment, no member of a class designated by the donor of the power may be entirely excluded by the donee of the power from at least a substantial participation in the distribution of the trust fund or estate. In 21 Ruling Case Law, p. 806, where various references are cited in support of the rule there announced, it is said: "At common law if the donor of a power of appointment by will has, in the instrument creating the

power, designated a class of persons among whom the subject of the power is to be appointed, the provisions of a will which excludes any of the class will not be a valid execution of the power."

And in 49 Corpus Juris, pp. 1265, 1266, the rule is thus stated: "A power of appointment is non-exclusive when no right of selection among the objects or of exclusion of any of them is given to the donee. So, under a power containing no words of exclusion, the property must be so distributed, if the power is exercised, that all the objects shall have some portion of it, and the exclusion of any member of the designated class in making the appointments invalidates the attempted exercise of the power."

And see extensive note with digest of pertinent authorities in L. R. A. 1916D, p. 505.

Among the numerous precedents, the following are noted: The power to appoint "children," or "issue," respectively, is not validly exercised where one child is omitted from the class (*White v. Wilson* (1853) 22 L. J. Eq. (N. S.) 62; *Stolworthy v. Sancroft* (1864) 33 L. J. Eq. (N. S.) 709; *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232; *Morris v. Owen*, 2 Call [6 Va.] 520); or when "children and grandchildren" are designated in the power, none may be omitted from the appointment (*Wright v. Wright*, 41 N. J. Eq. 382, 4 A. 855); where the power specifies "grandchildren," all must receive (*Cameron v. Crowley*, 72 N. J. Eq. 681, 65 A. 875).

[12] In accordance with weight of authority, the conclusion as to the nonexclusiveness of the power herein would seem to be clearly indicated; hence, that such power was invalidly exercised.

Incidentally, the appellants urge the point that "the language of the power of appointment is precatory and not mandatory and, upon the failure of the donee to exercise it in a valid manner, the trust property remained part of the estate of the donor and descends to his heirs."

[13] As has been announced in numerous decisions the word "precatory" is properly applied to an expression by a trustor wherein a hope, a wish, a desire, a recommendation, or a request is indicated by him. Necessarily the words by which a precatory trust is created constitute an entreaty, and is beseeching, or suppliant, or prayer-

ful in its nature. *Bohon v. Barrett's Ex'r*, 79 Ky. 378; *Hunt v. Hunt*, 18 Wash. 14, 50 P. 578. And although by the earlier cases the doctrine of precatory trusts was carried to a great length, by the later authorities the decisions in that regard are much relaxed.

In *Igo v. Irvine*, 139 Ky. 634, 70 S. W. 836, it was held that "where testator devised certain land to his son absolutely, a subsequent provision by which testator requested all of his children, if any should die without issue, at their death to will the property received from his estate to testator's surviving children, or the issue of those dead, was insufficient to raise a precatory trust and limit the fee previously devised."

In the case of *Holmes v. Dalley*, 192 Mass. 451, 78 N. E. 513, where it was stated in the will of a testator that after the death of his wife one-half of the property of the trust fund should be paid to the wife's appointee, but that it was the wish and desire of the testator that the wife should make such appointment to the daughter of the testator and to her children, it was held that the words "wish and desire" contained in the will did not create what is commonly called a precatory trust, but was merely an expression of hope and belief of the testator.

Also, in *Trustees of Hillsdale College v. Wood*, 145 Mich. 257, 108 N. W. 675, where the declarations in the will were to the effect that it was the testator's request that upon the death of his wife, to whom the property had been specifically devised, she provide for testator's legatees as indicated in his will, it was held that such words did not create a precatory trust.

[14] Considering the language employed by the donor of the power in the instant matter, even by viewing it in the light of the most auspicious authorities to which the attention of this court has been directed, it is impossible to give to such language a construction which would admit of a conclusion favorable to the suggestion made by appellants to the effect that it is precatory in character. The donor's required disposition of his estate was plain, direct and conclusive. It constituted not an entreaty, nor a wish, a desire, a request, a recommendation, or anything of that sort. It is most apparent that the power created by its donor was mandatory.

It becomes unnecessary to consider other points presented by appellants.

It is ordered that the judgment or order be and it is reversed; and that regarding the questions involved in this appeal such proceedings only be had in the lower court that, after a determination by it of the names of the persons who, in accordance with the decision herein, are entitled to distribution of the estate as heirs of the donee of the power, an order be entered by which such persons, or their respective representatives, will share in the assets of said estate in accordance with their respective rights as such heirs.

I concur: CONREY, P. J.

YORK, Justice (dissenting).

I dissent. I am in accord with the foregoing opinion with the exception only of that portion which holds that the provision in the will of William Wilson Sloan, Jr., reading, "to the heirs of said William Wilson Sloan, 3d, as per his last will and testament," means that the said William Wilson Sloan, 3d, had to leave to *each* and every one of his heirs a portion to be designated by William Wilson Sloan, 3d. It is my opinion, in the absence of any direct California authority, that this provision of the will merely meant that the said deceased was limited in disposing of the property involved to a person or persons to be designated by him, but who *must* be his *heir* or *heirs*, and that he was *excluded* from disposing of any of the property to any person who was *not* his heir. Therefore, I believe that the judgment of the trial court should be affirmed.



7 Cal.App.2d 91

ROSSI v. SUPERIOR COURT IN AND FOR
SAN JOAQUIN COUNTY.

Civ. 5405.

District Court of Appeal, Third District,
California.

June 14, 1935.

1. Appeal and error ⇨544(1)

"Bill of exceptions" is a mere method of preserving a record upon which the appellant relies for a reversal of the trial court's decision, and it is not essentially a part of

the procedure of taking an appeal, but it is only incident to the process of an appeal.

[Ed. Note.—For other definitions of "Bill of Exceptions," see Words & Phrases.]

2. Appeal and error ⇨351(2)

Failure to procure settlement of bill of exceptions does not affect statutory time within which appeal may be taken, nor does it affect mandatory provisions of statute relative to limitation of time within which superior court may try cause on appeal from justice's court (Code Civ. Proc. §§ 981a, 988a).

3. Appeal and error ⇨786

Exercise of diligence in bringing an appeal on for hearing is procedural in its nature.

4. Justices of the peace ⇨140

Superior court held without jurisdiction to try cause on appeal from justice's court where more than one year elapsed after repeal of statute relative to appeals from justice court in cities of 30,000 population before case was set for trial, since repeal of such statute made statute requiring dismissal of appeals from justice court where not brought to trial within one year applicable to the appeal which was then pending (Code Civ. Proc. §§ 981a, 982a; St. 1933, p. 1904).

On petition for rehearing.

Petition denied.

For former opinion, see 45 P.(2d) 376.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for petitioner.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for respondent.

PER CURIAM.

The appeal from the judgment was taken in this case by filing with the clerk on February 9, 1933, the notice of appeal as provided by section 984 of the Code of Civil Procedure. Tyrrell v. Baldwin, 72 Cal. 192, 13 P. 475. This was then the method of taking an appeal from a justice's court in Stockton township from which this cause emanated, which township has a population of more than 30,000 inhabitants, as provided by section 982a of the same code, which then read: "The provisions of this chapter shall not apply to justices' courts in cities, cities and counties, towns and judicial townships having a population of thirty thousand or more. Appeals from

such last-mentioned courts shall be taken, heard and determined as provided in chapter four of this title relating to appeals from municipal courts."

[1,2] No bill of exceptions was settled or certified in this case as provided by section 988a of the Code of Civil Procedure, or at all. No application was ever presented by the appellant to the superior court of San Joaquin county to settle such a bill of exceptions pursuant to the provisions of the last-mentioned section. The bill of exceptions is not essentially a part of the procedure of taking an appeal. It is a mere method of preserving a record upon which the appellant relies for a reversal of the trial court's decision. It is only incident to the process of an appeal. The failure to procure the settlement of a bill of exceptions does not affect the statutory time within which an appeal may be taken, nor does it affect the mandatory provisions of section 981a of the Code of Civil Procedure with respect to the limitation of time within which a superior court may try a cause on appeal from the justice's court. June 5, 1933, section 982a, above quoted, was repealed (St. 1933, p. 1904), which provided that part 2, title 13, chapter 3, with relation to appeals from justices' courts, had no application in townships having a population of more than 30,000 inhabitants. This repeal became effective August 21, 1933, about six months after this appeal was taken. The repeal of this last-mentioned section gave full force and effect to section 981a, *supra*, which provides that: "No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, * * * where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court. * * *"

[3,4] The exercise of diligence in bringing an appeal on for hearing is procedural in its nature, and while it is true that the last-mentioned section did not apply to this case at the time the appeal was taken, the repeal of section 982a, *supra*, made it applicable to this appeal, which was then pending, and required the appellant to bring the case on for hearing in the superior court within one year from the filing of the appeal. It will be observed that more than one year elapsed after the repeal of section 982a before the case was set for trial on March 18, 1935. The superior court

therefore lost jurisdiction to try the cause, and it should have been dismissed on motion of the plaintiff. The petition for a writ of mandamus was properly directed to issue in this proceeding.

The petition for a rehearing is denied.



8 Cal.App.2d 35

MITSU NAKASHIMA v. TAKASE.

Civ. 9027.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1935.

1. Death ☞21

Where deceased was shot without warning, after alleged burglarious entry of store of defendant who reasonably believed that deceased was there to commit another felony, defendant *held* not liable for deceased's death (Pen. Code, §§ 197, 198).

2. Death ☞21

Where deceased, with another, used force in alleged burglarious entry of store of defendant who as a reasonable person had right to assume that they were armed, though in fact they were not, and that if interfered with they would use further force and violence to consummate a second felony which they had planned, or to make good their escape, defendant *held* not required to give warning before firing shots which killed deceased.

3. Death ☞75

In action for death where deceased was shot without warning after alleged burglarious entry of store of defendant who reasonably believed deceased was there to commit another felony, evidence *held* insufficient to show that defendant had intent to kill deceased.

4. Death ☞21

Defendant has right to use all force reasonably necessary to protect his person or property.

5. Death ☞75

In action for death of deceased who was shot after alleged burglarious entry of defendant's store, evidence *held* insufficient to show that defendant used more force than reasonably necessary to protect person and property.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Mitsu Nakashima against M. Takase. Judgment for plaintiff and defendant appeals.

Reversed, with directions.

J. Marion Wright, of Los Angeles, for appellant.

Henry C. Huntington and Marie Murphy Ellis, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff and respondent is the mother of deceased, Eddie Nakashima, who in company with one Matsuzaki, was shot by defendant and appellant on January 2, 1932, after he and the said Matsuzaki had burglariously broken into appellant's place of business at 523 East Tenth street in the city of Los Angeles in the nighttime, and were apparently in the act of committing another felony, to wit, theft. The facts are summarized at length in the findings of the trial court, some of which are as follows:

"The defendant came to his cafe on the day in question, January 2, 1932, and discovered that the glass in the door near the lock had been cut, but not removed. He clearly anticipated at that time the possibility at least, that the cafe might be robbed and that a felony might be committed; and that his surmise in this respect was correct is borne out by subsequent events. He called the Police Department during the afternoon, between two and three p. m., and conversed with a policeman. He returned to the cafe at 5:30 p. m. with a shotgun and entered the cafe, and secreted himself in the cafe in the dark. At that time it was dark. The interior of the cafe was dark. The defendant had not been there very long before he heard some persons at the front door, and saw shadows there; then very shortly he heard the glass broken and shortly thereafter the door opened and the forms of two persons entered.

"The position where the defendant had secreted himself was a dark location and such a location that the two persons who had entered could not see or observe him, and such persons were entirely unaware of his presence there. * * * from where the defendant was located, he could see down this passageway and see close

to the doorway and could see the forms. He saw them pass from the entrance-way into another portion of the room. * * *

"The two persons in question passed along the passage-way leading westerly and into a room in which was a pool table, and then to the west side of said room and toward the north, then to the northwest corner thereof where there was an open doorway. The decedent, Eddie Nakashima, was one of said two persons; he passed through that doorway and, as soon as he had gotten into the passage-way beyond, which placed him in direct line of fire with the defendant, the defendant fired without first giving a warning and an opportunity to the decedent to disclose who he was. In fact, the Court finds that, if any warning was given, it was given practically contemporaneously with the shooting of the gun. The Court also finds that, immediately that the said Eddie Nakashima went through the doorway and into the passage-way, the defendant blazed away at him; that decedent was unaware of defendant's presence and was not coming towards him. The consequence was that the decedent was shot in the side and a wound resulted from which he subsequently died. on January 28, 1932.

"In order that there should be no question, the Court finds that at least so far as the defendant was concerned, the circumstances of the decedent entering the store were such as to reasonably and properly cause a belief in his mind that the persons in his place of business were attempting a felony; and that, so far as the defendant is concerned, and independent of the question of what their motive might have been, he was justified in believing they were there in the attempted commission of a felony, and that he anticipated the act from his discovery of the cut glass in the door earlier in the day. * * * The evidence is definite that, from the position where the defendant stood, marked as X on the diagram, from which place he fired the shotgun, he was entirely hidden from these parties and from the decedent, and his whereabouts unknown to them. He did not contact with them at any time in the store prior to the time of the arrival of the police officials. He fired practically without warning, and then immediately went through the passage-way already referred to, directly to the entrance and out into the street. At that

point, he assumed a position as a guard over the store."

[1] Section 197 of the Penal Code provides: "Justifiable homicide by other persons. Homicide is also justifiable when committed by any person in either of the following cases: * * * 2. *When committed in defense of habitation, property, or person*, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein. * * *

Section 198 of the same code provides: "A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

The findings of the trial court that the defendant "was justified in believing that they (Nakashima and his partner) were there in the attempted commission of a felony" and that "the circumstances * * * were such as to reasonably and properly cause a belief in his (defendant's) mind that the persons in his place of business were attempting a felony * * *" are sufficient in our opinion to justify the shooting and to exonerate defendant from any civil or criminal liability.

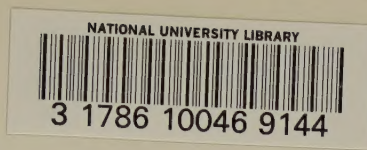
[2] If the deceased had recovered from the wound received, instead of dying, it could hardly be contended that the facts as outlined would have formed a sufficient basis for a cause of action brought by himself for damages. His mother, the respondent here, is in no better position. We accept the trial court's finding that the defendant did not give any warning before shooting. The evidence in support thereof is conclusive. We hold, however, that when two people burglariously break into the premises of another, the person in rightful possession is not called upon to give any warning to prevent another felony, to wit, theft of property, when as a reasonably prudent man he is justified in concluding from the circumstances of the entry that the felons have not only already committed one crime, to wit, burglary, but are about to commit an-

other, to wit, theft, both with force and violence. There was force and violence used here in the act of breaking in, and defendant as a reasonable person had a right to assume that the two burglars were armed (although the evidence in this case shows that they were not), and that, if interfered with, they would use further force and violence to consummate the theft they had planned or to make good their escape. Under such circumstances, defendant had a right as a reasonably prudent person to assume that if he gave any warning he would have to pay for his charity with his own life or to his great bodily harm. *Brooks v. Sessagesimo*, 139 Cal. App. 679, 34 P.(2d) 766, recently decided, is substantially on all fours with the instant case, and so holds.

[3-5] Furthermore, aside from the fact that death resulted, there is no evidence that defendant had any intent to kill deceased. In attempting to protect his own property or himself, or both, defendant was not engaged in an *unlawful* act, and it cannot therefore be said that, because the person who was shot died, there was an intent to kill. The only logical intent which can be drawn from the evidence is an intention on the part of the defendant to prevent the commission of a second felony, the first, to wit, burglary, having already been committed. The time-worn rule of torts is that a person has a right to use all such force as is reasonably necessary to protect his person or property. *Bigelow on Torts* (8th Ed.) p. 153. If the wound inflicted on the deceased in the instant case had been slight, could it have been said that more than reasonable force was used? Because defendant, shooting in the dark, inflicted a fatal wound instead of a superficial one, is he to be penalized for his lack of marksmanship, of which he may have had none to start with, or conceding that he was more than an average marksman, is he then to be penalized for his inability to use such skill in the darkness and under circumstances conducive to great mental and physical excitement? We think not.

The judgment in favor of respondent is reversed, and since there is no conflict in the evidence, the trial court is directed to enter judgment for defendant and appellant.

We concur: HOUSER, Acting P. J.; YORK, J.



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